UNITED STATES REPORTS

VOLUME 406

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1971

APRIL 21 THROUGH JUNE 7, 1972

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

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Stock No. 2801-00376

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1971

S&E CONTRACTORS, INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 70–88. Argued October 21, 1971—Reargued March 20, 1972—Decided April 24, 1972

In a contract disputes procedure, the Atomic Energy Commission (AEC) approved claims of its contractor for additional compensation. In response to an AEC certifying officer's request for advice as to one item, however, the General Accounting Office (GAO) ruled that the claims could not be certified for payment. When the AEC then refused to pay the compensation, the contractor brought suit in the Court of Claims alleging that the GAO had no authority to overturn the AEC approval. The Government, through the Department of Justice, defended on the ground that the AEC determination was not final but was subject to judicial review under the standards specified in § 321 of the Wunderlich Act, "[t]hat . . . the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." The Court of Claims held that "the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim." *Held:*

1. The AEC, which for the purpose of this contract was the United States, had exclusive administrative authority under the disputes clause procedure to resolve the dispute here at issue, and neither the contract between the parties nor the Wunderlich Act permitted still further administrative review by the GAO. Pp. 8–12.

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2. The Wunderlich Act does not confer upon the Department of Justice the right to appeal from a decision of an administrative agency, nor is this a case involving a contractor's fraud, concerning which the Department has broad powers to act under several statutory provisions. Pp. 12–19.

193 Ct. Cl. 335, 433 F. 2d 1373, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 19. BRENNAN, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 23. REHNQUIST, J., took no part in the consideration or decision of the case.

Geoffrey Creyke, Jr., reargued the cause for petitioner. With him on the briefs was *John P. Wiese.*

Irving Jaffe reargued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Gray, Samuel Huntington,* and *Walter H. Fleischer.*

Briefs of *amici curiae* urging reversal were filed by *Edward L. Wright, Beverly C. Moore, F. Trowbridge vom Baur, Overton A. Currie, Marshall J. Doke, Jr., Gilbert A. Cuneo, George M. Coburn, Eldon H. Crowell,* and *John A. McWhorter* for the American Bar Association, and by *Harold C. Petrowitz, pro se.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The question presented in this case is whether the Department of Justice may challenge the finality of a contract disputes decision made by the Atomic Energy Commission (AEC) in favor of its contractor, where the contract provides that the decision of AEC shall be "final

and conclusive." Section 1 of the Wunderlich Act leaves open for contest a claim that "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." [1]

Moreover, 41 U. S. C. § 322, provides that "[n]o government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

The Department of Justice challenged the settlement made by the AEC on two grounds, (1) that the decision was "not supported by substantial evidence" and (2) that it was "erroneous as a matter of law."

But the disputes clause in the contract [2] says that the decision of the AEC is "final and conclusive," unless

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[1] The Wunderlich Act, 68 Stat. 81, provides:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 41 U. S. C. § 321.

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board." 41 U. S. C. § 322.

[2] The contract provided:

"6. *Disputes*

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within

a court determines that the award is vulnerable under §§ 1 and 2 of the Act. There is no federal statute which submits disputes of this character to review by one or more administrative agencies, where as here there is no charge of fraud or bad faith. Nor is there a statute which enables another federal agency to contest in court the validity of the decision of the AEC, absent fraud or bad faith.

In plain lay language the question then is whether, absent fraud or bad faith, the contractor can rely on the ruling of the federal agency with which it made the contract or can be forced to go through still another tier of federal review. We hold that absent fraud or bad faith the federal agency's settlement under the disputes clause is binding on the Government; that there is not another tier of administrative review; and that, save for fraud or bad faith, the decision of AEC is "final and conclusive," it being for these purposes the Federal Government. We reverse the judgment of the Court of Claims.

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30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

"(b) This 'Disputes' Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

I

On August 4, 1961, petitioner contracted with the AEC to build a testing facility at the National Reactor Test Station in Idaho. The work was completed and accepted by the AEC on June 29, 1962. Because of various changes in contract specifications and difficulties in meeting performance schedules, petitioner submitted a series of claims to the contracting officer for resolution under the standard disputes clause contained in the contract, asking for equitable modifications of the contract and additional compensation. On August 8 and November 8, 1962, the contracting officer approved some of the claims and disapproved others, and the petitioner sought review of the adverse decisions with the AEC.

Since it did not then have a contract appeals board,[3] the Commission referred petitioner's appeal to a hearing examiner, before whom an adversary hearing was held. On June 26, 1963, the examiner decided in favor of eight of petitioner's claims and remanded the dispute to the contracting officer for negotiations to determine the exact amount due petitioner. 2 A. E. C. 631. The contracting officer then sought review of this decision by the Commission. See 10 CFR § 2.760 (Jan. 1, 1963).

The Commission declined to review four of the claims, 2 A. E. C. 738, which had the effect of sustaining the examiner's decision on them. 10 CFR § 2.762 (a) (Jan. 1, 1963). Included within this group was the examiner's determination that amounts due petitioner could not be retained to offset claims allegedly owed by petitioner to other contractors and other agencies of government. The

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[3] The Atomic Energy Commission Board of Contract Appeals was not established until 1964. See 10 CFR § 3.1 *et seq.* (Jan. 1, 1971).

Commission modified the examiner's decision on three of the remaining claims and reversed him on the last, which petitioner has since abandoned. It "remanded to the contracting officer with instructions to proceed to final settlement or decision in accordance with the decision of the hearing examiner dated June 26, 1963, as modified by [its] order of November 14, 1963, and by [that] decision." 2 A. E. C. 850, 856.

On March 6, 1964, prior to the AEC's final ruling but after it had upheld the examiner's decision on the "retainage" claim, a certifying officer of the Commission requested the opinion of the General Accounting Office on whether a voucher for the retainage claim could be certified for payment. Jurisdiction for the Comptroller General's review was purportedly founded upon 31 U. S. C. § 82d.[4] After some 33 months of what amounted to a plenary review of the proceedings before the examiner, the Comptroller General concluded that the voucher could not be certified for payment. 46 Comp. Gen. 441. On March 27, 1967, the AEC wrote petitioner, saying, "The Atomic Energy Commission's view is that S&E Contractors, Inc. has exhausted its administrative recourse to the Commission. The Commission will take no action, in connection with the claims, inconsistent with the views expressed by the Comptroller General . . . ." The petitioner then brought this action in the Court of Claims seeking a judgment of $1.95 million and an order remanding the case for negotiations on the time extension

[4] Volume 55 Stat. 876, 31 U. S. C. § 82d provides:

"The liability of certifying officers or employees shall be enforced in the same manner and to the same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification."

to which it claimed it was entitled under the AEC's original decision.

The defenses tendered raised no issue of any fraud or bad faith of the contractor against the United States.

On cross-motions for summary judgment, a commissioner of the Court of Claims ruled in favor of petitioner, holding that the General Accounting Office lacked authority to review the decision of the AEC and that the AEC's refusal to follow its own decisions favorable to petitioner was a breach of the disputes clause of the contract. On review by the Court of Claims, however, that decision was reversed by a four-to-three vote. While the majority acknowledged "that the Comptroller General effectively stopped payment of the claims," it did not pass upon the legality of that action. 193 Ct. Cl. 335, 340, 433 F. 2d 1373, 1375. Reasoning, instead, that the Wunderlich Act allowed both the Department of Justice and contractors an equal right to judicial review of administrative decisions and that the AEC's refusal to abide by its earlier decision was a permissible means of obtaining this review, it remanded petitioner's claims "to the commissioner for his consideration and report on the various claims under Wunderlich Act standards." *Id.*, at 351, 433 F. 2d, at 1381.

The Commissioner did not base his opinion on any issue of fraud or bad faith of the contractor against the United States, nor did the Court of Claims. The case is now here on a petition for writ of certiorari which we granted. 402 U. S. 971.

Petitioner argues that neither the text nor the legislative history of the Wunderlich Act supports the right of the United States to seek judicial review of an administrative decision on a contractual dispute, that the General Accounting Office was without statutory or contractual authority to overturn the AEC's decision, and that the

AEC should not be allowed to abandon after some 33 months its own decision that had been made in petitioner's favor. In response, the Solicitor General contends that the Wunderlich Act does give the Department of Justice the right of judicial review of contract decisions made by federal administrative agencies and that the Department of Justice is free to assert whatever defenses it desires in the Court of Claims without regard to the earlier actions of the federal contracting agency.

II

The disputes clause included in Government contracts is intended, absent fraud or bad faith, to provide a quick and efficient administrative remedy and to avoid "vexatious and expensive and, to the contractor oftentimes, ruinous litigation." *Kihlberg* v. *United States*, 97 U. S. 398, 401 (1878). The contractor has ceded his right to seek immediate judicial redress for his grievances and has contractually bound himself to "proceed diligently with the performance of the contract" during the disputes process. The purpose of avoiding "vexatious litigation" would not be served, however, by substituting the action of officials acting in derogation of the contract.[5]

The result in some cases might be sheer disaster. In the present case nearly a decade has passed since petitioner completed the performance of a contract under which the only agency empowered to act determined that it was entitled to payment. To postpone payment for such a period is to sanction precisely the sort of "vexatious litigation" which the disputes process was designed to avoid.

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[5] The American Bar Association, as *amicus curiae*, notes "that the contractor's consent to permit a specific representative of the Government to decide disputes—the Commission—should not be read as permitting any different representative of the Government to 'veto' decisions rendered by the Commission which are in favor of the contractor."

Here, petitioner contracted with the United States acting through the AEC and it was exclusively with this Commission that the administrative resolution of disputes rested. Disputes initially were to be resolved between the contractor and the contracting officer and, if a settlement satisfactory to the contractor could be reached at that level, no review would lie.[6] See *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *United States* v. *Corliss Steam-Engine Co.*, 91 U. S. 321.

By the disputes clause[7] the decision of the AEC is "final and conclusive" unless "a court of competent jurisdiction" decides otherwise for the enumerated reasons. Neither the Wunderlich Act nor the disputes clause empowers any other administrative agency to have a veto of the AEC's "final" decision or authority to review it. Nor does any other Act of Congress, except where fraud or bad faith is involved, give any other part of the Executive Branch authority to submit the matter to any court for determination. In other words, we cannot infer that by some legerdemain the disputes clause submitted the dispute to further administrative challenge or approval,[8] and did not mean what it says when it made

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[6] While the quoted language from paragraph 6 (a) of the contract concerns factual disputes and while questions of law are dealt with in paragraph 6 (b) (see n. 2, *supra*), there is no reason to believe that the two clauses should not be considered *in pari materia* or that a different avenue for review should apply to legal questions than to those of fact. Indeed, paragraph 6 (b) speaks of "consideration of law questions *in connection with decisions provided for in paragraph (a)*." (Emphasis added.) The difference between the two clauses relates only to the standard of reviewability and does not establish separate avenues of review.

[7] See n. 2, *supra*.

[8] For certain types of fraud against the Government, Congress has vested the General Accounting Office with investigative powers. In the case of kickbacks by Government contractors, for example, "the General Accounting Office shall have the power to inspect the

the AEC's decision "final and conclusive." See *United States* v. *Mason & Hanger Co., supra,* at 326. Kipps, The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause, 2 Pub. Contract L. J. 286 (1969); Schultz, Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes, 29 Law & Contemp. Prob. 115, 132–133 (1964).

A citizen has the right to expect fair dealing from his government, see *Vitarelli* v. *Seaton,* 359 U. S. 535, and this entails in the present context treating the government as a unit rather than as an amalgam of separate entities. Here, the AEC spoke for the United States and its decision, absent fraud or bad faith, should be honored. Cf. *NLRB* v. *Nash-Finch Co.,* 404 U. S. 138.

Since the AEC withheld payment solely because of the views of the Comptroller General and since he had been given no authority to function as another tier of administrative review, there was no valid reason for the AEC not to settle with petitioner according to its earlier decision. For that purpose the AEC was the United States. Cf. *Small Business Administration* v. *McClellan,* 364 U. S. 446, 449.

The cases deny review by the Comptroller General of administrative disputes clause decisions as "without legal authority" absent fraud or overreaching. *E. g., McShain Co.* v. *United States,* 83 Ct. Cl. 405, 409 (1936). In

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plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract," 74 Stat. 741, 41 U. S. C. § 53, and criminal penalties are provided if a violation is established. 41 U. S. C. § 54.

If the Comptroller General has the broad, roving, investigatory powers that are asserted, specific statutory grants of authority such as this provision relating to kickbacks would be superfluous.

James Graham Mfg. Co. v. *United States,* 91 F. Supp. 715 (ND Cal. 1950), for example, the contracting agency had determined that the contractor was entitled to reimbursement for certain expenditures under two cost-plus-fee contracts, but the Comptroller General refused payment. While the court noted the "extensive and broad" powers of the Comptroller General, it held that, absent instances of "fraud or overreaching," where the Comptroller General's power was founded upon specific statutory provisions such as 41 U. S. C. § 53, he had no "authority to determine the propriety of contract payments" approved by the contracting agency. 91 F. Supp., at 716. Accordingly, summary judgment was entered by the court, which said, "Since the Navy Department has determined that plaintiff contractor is entitled to the payment sought, this Court must adjudge accordingly." *Id.,* at 717.

Congress contemplated giving the General Accounting Office such powers and, indeed, the Senate twice passed—in the form of the McCarran bill—a provision which would have allowed the Comptroller to review disputes decisions to determine if they were "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." S. 24, 83d Cong., 1st Sess. (1953). "If enacted, it would [have] invest[ed] the GAO with the power—which it has never had—to upset an administrative decision which it [found] 'grossly erroneous' or 'not supported by reliable, probative, and substantial evidence.'" Schultz, Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case, 67 Harv. L. Rev. 217, 243 (1953). The House of Representatives rejected this provision, however, and the Wunderlich Act was ultimately passed in its present form. We cannot, therefore, construe

it to give the Comptroller General powers which Congress has plainly denied.

It is suggested, however, that the Comptroller General's power is not one of review over the AEC decision but is merely the power "to force the contractor to bring suit and thus to obtain judicial review for the Government." The disputes clause, however, sets forth the administrative means for resolving contractual disputes. Under the present contract the AEC is the final administrative arbiter of such claims and nowhere is there a provision for oversight by the Comptroller General. The Comptroller General, however, conducted a 33-month *de novo* review of the AEC proceedings; he blocked the payment to which the AEC determined petitioner was entitled; and he placed upon petitioner the burden of going to the Court of Claims to receive that payment. That action by the Comptroller General was a form of additional administrative oversight foreclosed by the disputes clause.

III

A majority of the Court of Claims held "that the Government has the right to the same extent as the contractor to seek judicial review of an unfavorable administrative decision on a contract claim." 193 Ct. Cl., at 346, 433 F. 2d, at 1378. The Solicitor General adopts this view and sees in the Attorney General's obligation to conduct litigation on behalf of the United States, 28 U. S. C. §§ 516, 519, the power to overturn decisions of coordinate offices of the Executive Department.

The Attorney General has the duty to "conduct . . . litigation in which the United States, an agency, or officer thereof is a party," 28 U. S. C. § 516, and to "supervise all [such] litigation," 28 U. S. C. § 519. That power is pervasive but it does not appear how under the Wunderlich Act it gives the Department of Justice the right to appeal from a decision of the Atomic

Energy Commission. Normally, where the responsibility for rendering a decision is vested in a coordinate branch of Government, the duty of the Department of Justice is to implement that decision and not to repudiate it. See 39 Op. Atty. Gen. 67, 68 (1937); 38 Op. Atty. Gen. 149, 150 (1934); 25 Op. Atty. Gen. 524, 529 (1905); 25 Op. Atty. Gen. 93, 96 (1903); 20 Op. Atty. Gen. 711, 713 (1894); 20 Op. Atty. Gen. 270, 272 (1891); 17 Op. Atty. Gen. 332, 333 (1882). Indeed, this view of the role of the Department of Justice may be traced back to William Wirt, the first of our Attorneys General to keep detailed records of his tenure in office. "Wirt it was who first recorded the propositions that the Attorney General does not decide questions of fact, that the Attorney General does not sit as an arbitrator in disputes between the government departments and private individuals nor as a reviewing officer to hear appeals from the decisions of public officers . . . ." H. Cummings & C. McFarland, Federal Justice 84 (1937) (footnotes omitted).

The power to appeal to the Court of Claims a decision of the federal agency under a disputes clause in a contract which the agency is authorized to make is not to be found in the Wunderlich Act and its underlying legislative history.[9] That Act was designed to overturn our

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[9] It has been said that the Act's legislative history "has something for everyone." Kipps, The Right of the Government to Have Judicial Review of a Board of Contract Appeals Decision Made Under the Disputes Clause, 2 Pub. Contract L. J. 286, 295 (1969). Suffice it to say we find the Act's history at best ambiguous. In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws. See generally *NLRB* v. *Fruit Packers*, 377 U. S. 58, 66 (1964); *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 288 (1956); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 394–395 (1951); *United States* v. *St. Paul, M. & M. R. Co.*, 247 U. S. 310, 318 (1918); *Omaha*

decision in *United States* v. *Wunderlich*, 342 U. S. 98 (1951), which had closed the courthouse doors to certain citizens aggrieved by administrative action amounting to something less than fraud. See S. Rep. No. 32, 83d Cong., 1st Sess.; H. R. Rep. No. 1380, 83d Cong., 2d Sess. It should not be construed to require a citizen to perform the Herculean task of beheading the Hydra in order to obtain justice from his Government.

We are reluctant to construe a statute enacted to free citizens from a form of administrative tyranny so as to subject them to additional bureaucratic oversight, where there is no evidence of fraud or overreaching. In this connection, it should be noted that committee reports accompanying the Wunderlich Act indicate that judicial review was provided so that contractors would not inflate their bids to take into account the uncertainties of administrative action.[10] This objective would be ill served

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& Council Bluffs Street R. Co. v. *ICC*, 230 U. S. 324, 333 (1913); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 318 (1897).

The reason is the *caveat* of Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means." The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419.

[10] The House Report stated, "A continuation of this situation [created by the *Wunderlich* decision] will render the performance of Government work less attractive to the responsible industries upon whom the Government must rely for the performance of such work, and will adversely affect the free and competitive nature of such work. It will discourage the more responsible element of every industry from engaging in Government work and will attract more speculative elements whose bids will contain contingent allowances intended to protect them from unconscionable decisions of Government officials rendered during the performance of their contracts." H. R. Rep. No. 1380, 83d Cong., 2d Sess., 4.

In a similar vein, the Senate Report on the Senate version of the Wunderlich Act stated, "The impact of this decision on the many business firms who, in a condition of expanding production with respect to the defense of the United States, must deal with many

if Government contractors—having won a favorable decision before the agencies with whom they contracted—had also to run the gantlet of the General Accounting Office and the Department of Justice.

IV

A contractor's fraud is of course a wholly different genus than the case now before us. Even where the contractor has obtained a judgment and the time for review of it has expired, fraud on an administrative agency or on the court enforcing the agency action is ground for setting aside the judgment. "[S]etting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it," *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 245, are the usual forms of relief which have been granted. Patents obtained with unclean hands and contracts that are based on those patents are similarly tainted and will not be enforced. *Precision Co.* v. *Automotive Co.*, 324 U. S. 806. Contracts with the United States—like patents—are matters concerning far more than the interest of the adverse parties; they entail the public interest:

> "[W]here a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public." *Id.*, at 815.

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of the Government departments in Government construction and defense materials, was one that could only cause great expense to the United States in that the contractors would be forced to puff up their bids so as to be sure of sufficient funds to provide for unforeseen contingencies." S. Rep. No. 32, 83d Cong., 1st Sess., 2.

Congress has made elaborate provisions for dealing with fraudulent claims of contractors. Where the Comptroller General is convinced "that any settlement was induced by fraud," he is directed to "certify . . . all the facts . . . to the Department of Justice, to the Administrator of General Services, and to the contracting agency concerned." 58 Stat. 664, as amended, 41 U. S. C. § 116 (b). The Administrator of General Services is also given broad powers of investigation and he is directed to give the Department of Justice "any information received by him indicating any fraudulent practices, for appropriate action." 41 U. S. C. § 118 (d). Moreover, whenever "any contracting agency or the Administrator of General Services believes that any settlement was induced by fraud," the facts shall be reported to the Department of Justice. 41 U. S. C. § 118 (e). And the Department of Justice is given broad powers to act. *Ibid.* In addition, Congress has imposed severe penalties on contractors who commit fraudulent acts and it has given the federal courts power to hear and determine such cases. 41 U. S. C. § 119.

Broad, flexible civil remedies are also provided against those who "use or engage in . . . an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property . . . ." 63 Stat. 392, 40 U. S. C. § 489 (b).

As to the Court of Claims, 28 U. S. C. § 2514 provides that: "A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

"In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture." [11]

These statutory provisions show that, apart from the inherent power of courts to deal with fraud, the Department of Justice indubitably has standing to appear or intervene at any time in any appropriate court to restrain enforcement of contracts with the United States based on fraud. See, *e. g., United States* v. *Hougham,* 364 U. S. 310 (1960); *Rex Trailer Co.* v. *United States,* 350 U. S. 148 (1956); *United States* v. *Dinerstein,* 362 F. 2d 852 (CA2 1966).

So far as the Wunderlich Act is concerned, it is irrelevant whether the administrative agency deciding this dispute is the AEC or the AEC's board of contract appeals. It was common in the beginning to give final authority over the resolution of disputes under a Government contract to the designated contracting officer, save for "fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment." *Kihlberg* v. *United States,* 97 U. S., at 402. Later came the present boards of contract appeals.

Boards of contract appeals within the respective agencies today are common. They are not statutory creations but are established by administrative regulations. S. Doc. No. 99, 89th Cong., 2d Sess., Operation and Effectiveness of Government Boards of Contract Appeals 20–21. Their decisions "constitute administrative

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[11] Where the Department of Justice has successfully asserted this defense of fraud, the Court of Claims has disallowed contractors' claims. See, *e. g., Kamen Soap Products Co.* v. *United States,* 129 Ct. Cl. 619, 124 F. Supp. 608 (1954) (fraudulent preparation of evidence); *Morris Demolition Corp.* v. *United States,* 99 Ct. Cl. 336 (1943); *Jerman* v. *United States,* 96 Ct. Cl. 540 (1942) (fraudulent invoices); *Mervin Contracting Corp.* v. *United States,* 94 Ct. Cl. 81 (1941) (false payroll vouchers); *Atlantic Contracting Co.* v. *United States,* 57 Ct. Cl. 185 (1922) (embezzlement).

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adjudication in its purest sense." *Id.*, at 21. As noted,[12] the AEC has had a board of contract appeals since 1964. Boards of contract appeals were in effect long before the Wunderlich Act and that explains why the Act provides for review "of any decision of the head of any department or agency or *his duly authorized representative or board.*" 41 U. S. C. § 321 (emphasis added).

We held in *United States* v. *Bianchi & Co.*, 373 U. S. 709, that even where the decision on review in the Court of Claims is that of a board of contract appeals, the review must be on the administrative record and that no trial *de novo* may be held. That decision led to proposals in Congress that, in effect, rulings of contract appeals boards be denied finality.[13] S. Doc. No. 99, *supra*, at 25–26 and n. 70. But Congress has not taken that step. Some have urged that where a decision of a board of contract appeals is involved, the United States should have standing to appeal to the Court of Claims. *Id.*, at 159. But our leading authority on these problems, Professor Harold C. Petrowitz, who wrote S. Doc. No. 99, *supra*, observed, "This has never been done, and the procedure may appear anomalous in view of the relatively close relationship between boards and the agencies they serve." *Ibid.* However serious the problem may be and whatever its dimensions, it is obviously one for the Congress to resolve, not for us to resolve within the limits of the Wunderlich Act.

This case does not involve the situation where an administrative agency, upon timely petition for rehearing or prompt *sua sponte* reconsideration, determines that its earlier decision was wrong and, for that reason, refuses

[12] See n. 3, *supra*. And see 29 Fed. Reg. 12829 *et seq.*

[13] For other aspects of exhaustion of administrative review of decisions from boards of contract appeals, see *United States* v. *Moorman*, 338 U. S. 457; *United States* v. *Grace & Sons*, 384 U. S. 424; *United States* v. *Utah Construction Co.*, 384 U. S. 394.

to abide by it. The AEC has not, to this day, repudiated the merits of its decisions in favor of petitioner. Nor, to repeat, is this a case of a fraud of a contractor against the United States. This is simply an instance where a contractor successfully resolved its disputes with the agency with which it had contracted and to whom that power had been delegated. The fruits of petitioner's labors were frustrated, however, by the intermeddling of another agency without power to act and, when petitioner sought enforcement of its rights in court, still another agency of the Government entered and sought to disavow the decision made here by the AEC.

If the General Accounting Office or the Department of Justice is to be an ombudsman reviewing each and every decision rendered by the coordinate branches of the Government, that mandate should come from Congress, not from this Court.

The judgment of the Court of Claims is

Reversed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, concurring.

Because I agree that in this case, where neither fraud nor bad faith is charged, the Wunderlich Act, 41 U. S. C. §§ 321–322, does not operate to give the United States the power to challenge a contract disputes clause finding of fact in favor of the contractor by the Government's own contracting agency, I join the Court's opinion and its judgment. I venture some supportive comments:

1. The contracting officer and the Atomic Energy Commission acted here in an executive capacity for the United

States. See *Small Business Administration* v. *McClellan*, 364 U. S. 446, 448–450 (1960). The Commission is the party to the contract with the contractor. Its exercise of executive judgment is necessarily that of the United States. Yet the Government, by its position here, would grant itself the right to challenge its own executive determination whenever the General Accounting Office, by interposition, thinks this should be done. This, for me, does not make good sense and, in the absence of clear congressional authorization, I doubt that it would make good law.

2. The disputes clause in Government contracts has been employed for over four decades. The clause is one drawn and prescribed by the United States. It is not one drawn by the contractor or by any group of contractors with whom the United States deals. And for years, with the specified exceptions, that clause itself has been regarded as conferring no right of judicial review on the part of the Government.

3. By accepting the disputes clause in his contract, the contractor bears the interim financial burden and gives up the right of rescission and the right to sue for damages. What he receives in return is the Government's assurances of speedy settlement and of prompt payment, not payment delayed for months or, as here, for years.

4. To compel a contractor to go through the administrative process and to proceed and to perform with less than his usual arsenal of defenses against administrative arbitrariness or unfairness, and then to have that determination submitted to judicial review at the behest of still another agency of Government, subjects the contractor to untoward delay in payment and to a financial hazard that may well prove to be ruinous.

5. The result would be a strange one if, as even the GAO here concedes, a contracting officer's decision favorable to a contractor possesses finality, *United States* v. *Corliss*

Steam-Engine Co., 91 U. S. 321 (1876); *United States* v. *Mason & Hanger Co.*, 260 U. S. 323 (1922), while a decision at the higher level of the agency itself does not. When the officer and the contractor agree to the disposition of a dispute, there is no occasion for the issuance of a decision by the contracting officer, and the Wunderlich Act, by its terms, does not apply. And if the contractor accepts a decision of the contracting officer, and does not appeal to the Commission, that decision, by the specific provisions of the disputes clause, is final and conclusive as to questions of fact. Under the Government's position, however, the decision at the agency head would enjoy no such preferred and conclusive status.*

6. Lurking in the background of the Court's decision is advantage to the Government resulting from what strikes me as a possible breach of contract. The contractor here, according to the long-term understanding of the disputes clause, consented to the disposition of disputes by the contracting officer and by the AEC on appeal, and to the finality of decision at those points. It did not

*Judge Collins, dissenting in the Court of Claims, says it well:

"When a dispute arises between a contractor and the Government, the 'disputes' clause sets out clearly the procedure to be followed. First, the parties may voluntarily settle the dispute. If they do, that is the end of the matter. If no settlement is reached, the disputed matters are decided by the agency's contracting officer. If the contractor does not appeal to the agency from the contracting officer's decision within the prescribed time, that, again, is the end of the matter. If, however, the contractor does appeal to the agency, then, according to the court, a decision rendered by the agency or its board favorable to the contractor is not the end of the matter; the agency is free at any time to disavow or repudiate its own decision, thereby forcing the contractor to sue. The anomaly created by the court's decision is too obvious to need elaboration. While an agency will still be bound by the decisions of its contracting officers, it will not be bound by decisions made at the highest level." 193 Ct. Cl. 335, 379–380, 433 F. 2d 1373, 1397–1398. (Footnotes omitted.)

consent to its review or to the exercise of veto power by any other agency of Government. When the United States then disavows the Commission's decision—a decision that, as the Court notes, to this day has never been withdrawn or repudiated by the AEC—it seems to me that the Government imposes something to which the contractor has not agreed.

7. The legislative history, which the dissent finds so clearly supportive of its conclusion, is not at all that clear for me. I doubt if anyone who reads and absorbs the Appendix to the dissent's opinion will find it clear and indicative. I regard it, as does the Court and as did the dissenters in the Court of Claims, as decidedly ambiguous at best. Even the Court of Claims majority struggled with the history and conceded that it did not "explicitly" provide for Government-instituted judicial review. 193 Ct. Cl. 335, 342, 433 F. 2d 1373, 1376. This is not surprising, for the Wunderlich Act was intended to relieve contractors from the holding in *United States* v. *Wunderlich*, 342 U. S. 98 (1951), where the Court restricted contractor-instigated judicial review to the situation of alleged and proved fraud. In *Wunderlich* the Government sought to reinstate an Interior Secretary's fact decision, favorable to the Government and adverse to the contractor, which the Court of Claims had set aside as "arbitrary," "capricious," and "grossly erroneous." The Government there urged—and prevailed over three dissenting votes—a narrow judicial review standard for the contractor. Congress reacted, and the Wunderlich Act overrode this restrictive measure of review and opened the door to the contractor to the extent permitted by the proviso clause of § 321.

I am not able to read into this legislative change a corresponding nod in the direction of the Government. The flat rejection by Congress of the proposed provision for GAO review is significant. There would be no point

in that rejection if GAO has the power to defeat the finality of the disputes decision anyway. And the differing approaches taken on this appeal by the Department of Justice and the GAO themselves indicate the inconclusiveness of the legislative history.

8. The issue is not whether advantage is or is not to be taken of the Government. Of course, the Government's rights are to be protected. That protection, however, is afforded by the nature and workings of the contract disputes system, by its emphasis on expeditious performance and getting the job done, and by the presence of the contracting officer and the agency, but not of the GAO. This results in fulfillment of the contract and, at the same time, gives the contractor the protection he needs against fraud, capriciousness, arbitrariness, bad faith, and absence of evidence. In the exercise of its legislative judgment, Congress has determined that in this area the Government needs no more.

I therefore join in reversing the judgment of the Court of Claims and in giving this contractor the benefit of the decision made by the Atomic Energy Commission itself, the very agency that was the contractor's opposite party to the contract.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

This is a suit by petitioner against the United States to recover on a contract between petitioner and the Atomic Energy Commission. The contract included a "disputes clause," which provided that the Commission would decide any factual disputes that arose under the contract and that its decision would "be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

The disputes clause also provided that while it did "not preclude consideration of law questions in connection with [disputes] decisions," it was not to "be construed as making final the [Commission's] decision . . . on a question of law." Disputes arose during performance of the contract, and the Commission decided them in petitioner's favor. The General Accounting Office, however, when rendering an advisory opinion requested on behalf of the Commission as to one of the disputed items, disagreed with the Commission's decision, and for that reason the Commission refused to pay. In petitioner's subsequent suit in the Court of Claims, petitioner relied upon the Commission's decision as a "final and conclusive" resolution of the disputes, entitling petitioner to summary judgment. The Department of Justice defended the suit on the grounds that the Commission's decision was not supported by substantial evidence and was erroneous on questions of law. The issue before us is whether the Government, through the Department of Justice, may assert those defenses.

It may be helpful at the outset to put this case in perspective by reviewing briefly the law developed over the past century to regulate the enforcement of disputes clauses in Government procurement contracts. Until 1954, with the passage of the Wunderlich Act, disputes clauses provided that the decision of a designated Government official upon a matter in dispute under the contract would be final and binding upon both parties. Although in terms the disputes clauses precluded judicial review of disputes decisions, this Court beginning in 1878 consistently held that the finality of a disputes decision could be challenged in court by either party on the ground of fraud or bad faith by the deciding Government official. Thus the "fraud" exception to the finality of disputes decisions was not written into disputes clauses but was judicially fashioned.

Under this system, then, a contractor dissatisfied with an adverse disputes decision could contest the finality of that decision only by proving in court that it was fraudulent. The Government, of course, bore an identical burden when it contested the finality of a disputes decision in favor of the contractor. That situation arose when GAO, congressional watchdog of Government expenditures, refused to sanction payment to a contractor of the amount found due under a disputes decision in his favor and thereby forced him to bring suit. GAO's view of the disputes decision, however, was of no consequence in court; indeed, whether or not the Government defended the contractor's suit was a matter solely for the judgment of the Government's lawyer, the Department of Justice. Once in court, the contractor relied upon the finality of the disputes decision and recovered on that basis unless the Government proved that the decision was fraudulent.

Over the years, the Court of Claims gradually broadened the fraud exception to the finality of disputes decisions. In 1951, however, this Court stopped the trend by holding that a disputes decision, rendered pursuant to a disputes clause purporting to make that decision final, was conclusive upon both parties unless the challenger proved in court that the deciding Government official was guilty of "conscious wrongdoing, an intention to cheat or be dishonest." *United States* v. *Wunderlich*, 342 U. S. 98, 100 (1951). *Wunderlich*'s narrow definition of the fraud exception alarmed the Government as well as contractors, for, in practical effect, it meant that disputes decisions were virtually invulnerable to challenge.

The result of this concern was the so-called Wunderlich Act, drafted by GAO and supported by GAO, Government procurement agencies, and contractors. The Act overruled *Wunderlich* by directing that no disputes clause, purporting to make disputes decisions final, "shall

be pleaded in any suit . . . as limiting judicial review of any [disputes] decision to cases where fraud by [the Government] official . . . is alleged." The Act did more than simply overrule *Wunderlich*, however, for it also explicitly stated the grounds upon which courts could set aside disputes decisions: "any [disputes] decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." Finally, the Act provided that "[n]o Government contract shall contain a provision making final on a question of law the decision of any [Government] official . . . ."

The Wunderlich Act, then, rendered the old forms of disputes clauses unserviceable, for no longer could the parties bind themselves to the finality of a disputes decision, judicially reviewable only if the challenger proved that it was fraudulent. Consequently, the disputes clause in the contract before us did not even attempt to provide for the finality of the Commission's disputes decisions, but instead expressly tracked the language of the Act. Under this disputes clause and the Act, the party dissatisfied with a disputes decision is no longer limited to challenging the finality of that decision only on the ground that it was "fraudulent," for the dissatisfied party is now entitled also to prove in court that the decision was "capricious," "arbitrary," "so grossly erroneous as necessarily to imply bad faith," "not supported by substantial evidence," or incorrect "on a question of law." In this case, the Government relied upon the last two grounds to challenge the finality of the Commission's disputes decision in favor of petitioner.[1]

[1] The concurring opinion seems to read the judicial-review provision out of the disputes clause: "And if the contractor accepts a decision of the contracting officer, and does not appeal to the Commission, that decision, by the *specific provisions* of the dis-

As noted above, under pre-Wunderlich Act disputes clauses, which purported to make disputes decisions final, the Government, like the contractor, could avail itself of the judicially created fraud exception to the finality of disputes decisions. The Government obtained judicial review when GAO refused to sanction payment after a disputes decision in favor of the contractor, thus forcing him to bring a suit in which the Department of Justice represented the Government. That was precisely the path followed in this case, for GAO, in response to a request for an advisory opinion, informed the Commission that payment would be improper because the disputes decision did not meet the standards of the Wunderlich Act, and, in petitioner's subsequent suit, the Department of Justice represented the Government. Had this case arisen under earlier forms of disputes clauses, which purported to make disputes decisions final, and before the Wunderlich Act, the Government could have defended the suit only on the judicially created ground that the disputes decision was fraudulent. Under the current clause and the Act,

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putes clause, is final and conclusive as to questions of fact. Under the Government's position, however, the decision at the agency head would enjoy no such preferred and conclusive status." *Ante*, at 21 (emphasis added). The Commission's disputes decision does not have "conclusive status" under the disputes clause, of course, because of a "specific provision" of the clause. That provision directs that the Commission's decision is "final and conclusive *unless*" (emphasis added) a court determines that it was "fraudulent," etc. It does *not* direct that the Commission's decision is final and conclusive unless the *contractor appeals* to the courts. That is the language of the earlier provision, referred to by the concurring opinion, under which the contracting officer's decision is final and conclusive unless the *contractor appeals* to the Commission. If "the specific provisions of the disputes clause" apply after the contracting officer's decision, surely they also apply after the Commission's decision.

however, the Government is not limited to that narrow ground. Like the contractor, the Government may now also rely upon any or all of the other grounds enumerated in the clause and the Act. The Commission's disputes decision is not "final and conclusive," under the clause and the Act, if the Court of Claims determines, as the Government asserted here, that the decision was "not supported by substantial evidence" or was incorrect "on a question of law." [2]

Yet the Court today holds that the Government has no right to defend petitioner's suit. Had the Commission's disputes decision been adverse to petitioner, of course, petitioner would have been free to challenge its finality in court, under the disputes clause and the Act, on the grounds that it was "not supported by substantial evidence" and was incorrect "on a question of law." The Court holds, however, that the Government may not challenge the finality of the disputes decision in favor of petitioner because the Government, under the disputes clause and the Act, has no right to judicial review of disputes decisions.[3] The Court reaches this

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[2] The Court's opening sentence appears to say that we are dealing with a pre-Wunderlich Act disputes clause that "provides that the decision of AEC shall be 'final and conclusive.'" *Ante*, at 2–3. The Court later recognizes the obvious: "By the Disputes Clause the decision of AEC is 'final and conclusive' unless 'a court of competent jurisdiction' decides otherwise for the enumerated reasons." *Id.*, at 9.

[3] It was suggested at oral argument that the procurement agency might pay the contractor in accordance with a disputes decision in his favor and that subsequently, prompted by GAO's post-audit, the Department of Justice might sue the contractor to recoup the payment on the ground that the agency's decision was improper under the disputes clause and the Wunderlich Act. The Court's holding today, of course, prohibits the Government from obtaining judicial review of disputes decisions by that method. Indeed, that would be an *a fortiori* case, for the agency not only would have decided in favor of the contractor, but also would have paid him in accord-

conclusion on the strength of its assertions that GAO had no business exercising its statutory authority and advising the Commission that the disputes decision was erroneous, that the Department of Justice had no business exercising its statutory authority and appearing in the Court of Claims to defend petitioner's suit, and that the Government is always entitled to relief if the contractor perpetrates a fraud. Noticeably absent from the Court's opinion is any justification for interpreting the disputes clause and the Act to apply only when a disputes decision is adverse to the contractor. Somehow the Court construes a contract and a statute that bar finality for *all* disputes decisions to require finality for disputes decisions in favor of contractors.

Today's decision is demonstrably wrong. The Court holds that Congress enacted the Wunderlich Act for the benefit of contractors, to arm them with grounds in addition to fraud to challenge in court the finality of disputes decisions unfavorable to them. Yet, without an iota of support in the language of the Act, which expressly governs "any" disputes decision in "any suit," or in the Act's legislative history, which confirms that the expanded grounds of judicial review were to be available to both the Government and contractors, the Court holds that the Government, unlike contractors, may not rely upon the Act to challenge in court the finality of disputes decisions. Indeed, the Court goes further, for, as noted, the disputes clause before us did not purport to make the Commission's disputes decisions final. The Court thus holds that the Act denies the Government the privilege of entering into a contract that affords it as well as the contractor the right to judicial review of disputes decisions. Hence, while the

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ance with its decision. If a disputes decision is final when the agency refuses to implement it by payment, certainly it is final when the agency pays.

Act ensures that contractors are entitled to judicial review even when the disputes clause provides for finality, the Act also, according to the Court, ensures that the Government is denied judicial review even when the disputes clause does not provide for finality. Today's decision produces the absurd result that when the Government agreed to a disputes clause with no provision for judicial review, it could nevertheless challenge the finality of a disputes decision at least for fraud, but now that the Government has agreed to a disputes clause specifying five grounds of judicial review, including fraud, it is entitled, holds the Court, to none at all.[4] The Government's position is thus worse than it was before the Act, for it is deprived of even the limited review for fraud to which it was entitled under *Wunderlich*. Finally, the Act flatly prohibits disputes clauses that make disputes decisions final on questions of law. The clause before us, following the Act, expressly pro-

[4] The Court's constant repetition of the phrase "fraud or bad faith" might suggest to the casual reader that the Court is holding that the Government may challenge the finality of disputes decisions on those grounds. That, however, is not true, for fraud and bad faith are two of the grounds specified in the disputes clause and the Wunderlich Act: a disputes decision may be set aside if it is "fraudulent" or if it is "so grossly erroneous as necessarily to imply bad faith." In contrast to the disputes clause and the Act, the Court is not referring to disputes decisions resulting from the fraud or bad faith of the *disputes decisionmaker*. Rather the Court is referring to fraud or bad faith on the part of the *contractor*, as the Court's statement of facts makes clear: "The defenses tendered raised no issue of any fraud or bad faith of the contractor against the United States." *Ante*, at 7. "The Commissioner did not base his opinion on any issue of fraud or bad faith of the contractor against the United States, nor did the Court of Claims." *Ibid.* See also *id.*, at 9–10, n. 8 and Part IV of the Court's opinion. The concurring opinion also refers to "fraud" and "bad faith." *Ante*, at 19. Again, however, the reference is not to fraud and bad faith as used in the disputes clause and the Act.

vided that the Commission's disputes decisions could not be final on questions of law. Yet, in the face of the Act and the disputes clause, the Court holds that the Commission's decision is final on questions of law.

Analysis of the judicial history of disputes clauses, both in this Court and in the Court of Claims, will unfortunately unduly extend the length of this opinion. But the devastation today's decision wreaks upon Government procurement practices is sufficient justification, and Congress should be alert to the urgent need for immediate remedial legislation. Congress alone can restore the former balance between Government and contractor, for today's decision not only holds that the Act's expanded scope of judicial review is available solely for contractors, but also holds that the Act, in some unspecified way, prohibits the contracting parties from agreeing to a disputes clause that affords the Government that same scope of review. Congress must therefore make more explicit what is already explicit in the Wunderlich Act, but this time in terms so plain that even this Court will be unable to thwart the congressional will.

I

A

The contract in *Kihlberg* v. *United States*, 97 U. S. 398 (1878), as the Court construed it, provided that the decision of a designated Government official would be "conclusive." The official rendered a decision adverse to the contractor, and the contractor brought suit. Because there was "neither allegation nor proof of fraud or bad faith" by the official, the Court held that his decision could not "be subjected to the revisory power of the courts without doing violence to the plain words of the contract." *Id.*, at 401. The Court then enunciated the standard of judicial review that has been the

basis for the decision of every subsequent disputes clause case, both in this Court and in the Court of Claims: "in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the [contractor] *as well as upon the government.*" *Id.*, at 402 (emphasis added).

The very first case in this Court, then, laid down the rule that a decision rendered pursuant to a disputes clause was equally binding upon *both* parties; the contractor and the Government could impeach a disputes decision that the contract purported to make final, but only by proving that the decision was fraudulent. Until today, this Court never departed from the *Kihlberg* view that the same standard of judicial review is available to both parties.

Sweeney v. *United States*, 109 U. S. 618 (1883), reiterated the *Kihlberg* rule in another suit by a contractor dissatisfied with a disputes decision rendered by a Government official. Because "there was neither fraud, nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer," the Court held, "on the authority of *Kihlberg* v. *United States*," that the official's decision was conclusive. *Id.*, at 620.

The Court next decided three cases involving contracts between private parties. In *Martinsburg & Potomac R. Co.* v. *March*, 114 U. S. 549 (1885), a contractor agreed to do certain work for a railroad company, and the contract provided that disputes would be decided by a company official whose decision would be "final and conclusive." *Id.*, at 553. The official's decision was in favor of the company, and the contractor brought suit. The Court, stating that the "case is within the principles announced in *Kihlberg* v. *United States* and

Sweeney v. *United States*," *id.*, at 550 (here, and in subsequent similar quotations, citations not repeated), held that the official's decision was conclusive because there was no proof that he "had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him," *id.*, at 553.

The contract in *Chicago, S. F. & C. R. Co.* v. *Price*, 138 U. S. 185 (1891), was essentially the same as the contract in *March*. In *Price*, however, the official's disputes decision was in favor of the contractor. The company refused to pay in accordance with the decision, and the contractor brought suit. The Court first reviewed *March* and stressed that *March* had applied "the principles announced in *Kihlberg* v. *United States* and *Sweeney* v. *United States*." *Id.*, at 193. The Court then pointed out that "[t]he only difference between that case [*March*] and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors." *Id.*, at 194. "[T]hat difference," said the Court, "cannot affect the interpretation of the contract." *Ibid.* Because there was no proof of "fraud upon the part of the company's engineers, or such gross mistakes by them as imply bad faith," the Court held that the disputes decision was binding upon the company. *Id.*, at 195.

Price thus established that the party whose employee was delegated authority to make the disputes decision could also challenge the finality of that decision, although, like the contractor, only under the *Kihlberg* test of fraud. The Court reaffirmed this application of the *Kihlberg* rule in *Sheffield & Birmingham Coal, Iron & R. Co.* v. *Gordon*, 151 U. S. 285 (1894), holding that

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"in the absence of fraud or mistake" by the company official, his decision in favor of the contractor "was conclusive upon the company." *Id.*, at 292.

United States v. *Gleason*, 175 U. S. 588 (1900), involved a Government official's disputes decision adverse to the contractor. The Court again affirmed the rule of *Kihlberg* and the intervening cases

> "that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts. *Martinsburg & Potomac Railroad* v. *March; Chicago, Sante Fé &c. Railroad* v. *Price.*" *Id.*, at 602.

The Court also followed the *Kihlberg* rule in *Ripley* v. *United States*, 223 U. S. 695, 701–702, 704 (1912), and *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387 (1916).

In *United States* v. *Mason & Hanger Co.*, 260 U. S. 323 (1922), the contractor was paid in accordance with a disputes decision in his favor, but the Comptroller of the Treasury disagreed with the decision and subsequently deducted the amount paid from other sums due the contractor. *Id.*, at 325. The contractor brought suit, relying upon the finality of the disputes decision. The Court's holding was direct and simple:

> "We have decided that the parties to the contract can so provide and that the decision of the officer is conclusive upon the parties. *Kihlberg* v. *United States; Martinsburg & Potomac R. R. Co.* v. *March;*

> *United States* v. *Gleason; Ripley* v. *United States.* This is extending the rule between private parties to the Government." *Id.*, at 326.

Mason & Hanger, then, applied the *Kihlberg* rule when the contractor in a Government contract *relied* upon the disputes decision by a Government official and the *Government* challenged it. Hence, *both* parties to a Government contract, like both parties to a private contract, as in *Price* and *Gordon,* were free to challenge the finality of a disputes decision, although only upon the limited grounds permissible under *Kihlberg.*

Mason & Hanger also held that "the Comptroller of the Treasury has no power" over a disputes decision, 260 U. S., at 326, meaning that his disagreement with the decision was irrelevant and had no effect in court, where the parties' rights under the contract were determined. The Government, like the contractor, could prevail only by proving that the disputes decision was fraudulent. The Comptroller's authority was limited to his power to refuse to sanction payment to the contractor, thereby forcing the contractor to bring suit for a judicial determination of his right to payment in accordance with the disputes decision in his favor.[5]

In sum, the rule first announced in *Kihlberg* in 1878 had, with *Mason & Hanger* in 1922, been held to apply to any disputes decision, whether in a Government or in a private contract, and to apply no matter which party relied upon the finality of the decision. If the Government (or, in a private contract, the party whose official decided the dispute) relied upon the finality of the decision, the contractor had to prove that it was fraudulent. *Kihlberg; Sweeney; March; Gleason.* If

[5] The Court's citation of *Mason & Hanger, ante,* at 10, is, to say the least, perplexing.

the contractor relied upon the finality of the decision, the Government (or, in a private contract, the party whose official decided the dispute) had to prove that it was fraudulent. *Price; Gordon; Mason & Hanger.*[6]

In *United States* v. *Moorman*, 338 U. S. 457 (1950), the Court once again gave extended consideration to the proper judicial interpretation of disputes clauses. The Court pointed out that "[c]ontractual provisions such as these have long been used by the Government. No congressional enactment condemns their creation or enforcement." *Id.*, at 460. The Court then reviewed *Kihlberg, Sweeney,* and *March,* and said that "[t]he holdings of the foregoing cases have never been departed from by this Court. They stand for the principle that parties competent to make contracts are also competent to make such agreements." *Id.*, at 461. The Court added that "[i]f parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government." *Id.*, at 462.

Finally, came *United States* v. *Wunderlich*, 342 U. S. 98 (1951). The contract contained the usual disputes clause providing that the disputes decision was "final and conclusive." *Id.*, at 99. After noting that the

[6] *Goltra* v. *Weeks*, 271 U. S. 536 (1926), which involved a contractor's challenge to the finality of a disputes decision by a Government official, also demonstrates that the rule was the same no matter which party challenged the decision. The Court there held that the official's decision was binding "unless there is an absence of good faith in the exercise of the judgment." *Id.*, at 548. Significantly, the Court cited as authority, not only *Kihlberg, Sweeney, March,* and *Gleason,* all cases in which the contractor challenged and the Government (in *March,* the party whose official decided the dispute) relied upon the disputes decision, but also *Mason & Hanger,* in which the Government challenged the finality of a disputes decision upon which the contractor relied.

same disputes clause had been upheld in *Moorman*, the Court stated:

> "Contracts, both governmental and private, have been before this Court in several cases in which provisions equivalent to [this disputes clause] have been approved and enforced 'in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment . . . .' *Kihlberg* v. *United States; Sweeney* v. *United States; Martinsburg & P. R. Co.* v. *March; Chicago, S. F. & C. R. Co.* v. *Price.*" *Id.*, at 99–100.

We thus have an unbroken line of cases in this Court, from 1878 to 1951, applying a simple, straightforward rule of judicial review. A contractual disputes clause making final a decision by an agent of one of the parties was given full effect in court, subject to the judicially created exception that allowed relief to the party challenging the decision if he was able to prove that it was fraudulent. This rule applied whether the contract was Government or private and no matter which party challenged the finality of the decision. In short, a disputes clause was *equally* binding upon both parties.

B

Most disputes clause cases, of course, have been decided not by this Court but by the Court of Claims. That court followed the *Kihlberg* rule when a contractor challenged a disputes decision against him, see, *e. g.*, *Kennedy* v. *United States*, 24 Ct. Cl. 122 (1889); *P. H. McLaughlin & Co.* v. *United States*, 37 Ct. Cl. 150 (1902); *Pacific Hardware Co.* v. *United States*, 49 Ct. Cl. 327 (1914); *Brinck* v. *United States*, 53 Ct. Cl. 170 (1918); *Southern Shipyard Corp.* v. *United States*, 76 Ct. Cl. 468 (1932), as well as when the Government challenged a disputes decision in the contractor's favor.

In *Pacific Hardware, supra,* the contract provided that a Government official would deduct specified amounts from the contract price if the contractor delayed in performing the contract. Deductions were made, and the contractor brought suit. The court applied the *Kihlberg* rule and upheld the deductions. 49 Ct. Cl., at 336. The contract also provided that the official could waive deductions under certain circumstances. The contractor argued that this power violated public policy and therefore vitiated the contract. The court rejected the argument, but added that the power to decide in favor of the contractor by waiving deductions, like the power to decide against the contractor by making deductions, was subject to the *Kihlberg* rule:

> "Of course, if there were fraud or such gross error as implies bad faith or a failure to exercise an honest judgment in deciding that the deductions be not made, the Government would not be bound and the contractor would remain liable." *Id.,* at 337.

In *Yale & Towne Mfg. Co.* v. *United States,* 58 Ct. Cl. 633 (1923), the disputes decision was in favor of the contractor, but the Government refused to pay because the Comptroller of the Treasury disagreed with the decision. The contractor argued "that the contract reposed in the contracting officer . . . the right to determine whether or not and the extent to which the contractor was entitled to extension of time, and that the finding of that officer was conclusive upon the parties in the absence of fraud or mistakes so gross as to imply bad faith." *Id.,* at 637.

The court, noting "that a long line of decisions not only by this court but by the Supreme Court requires the sustaining of the [contractor's] contention," stated:

> "Provisions in Government contracts reposing in some designated official the right to determine cer-

> tain questions and making his determination thereof conclusive are of frequent occurrence. Such provisions are inserted largely for the protection of the Government, and the cases in which such a determination by the designated official has been upheld by the courts have been largely cases in which the rule has been invoked in favor of the United States and against the [contractor], *but the rule is none the less effective if perchance it occasionally may operate the other way.*" *Id.*, at 638 (emphasis added).

In *Penn Bridge Co.* v. *United States*, 59 Ct. Cl. 892 (1924), the disputes decision was in favor of the contractor, but the Comptroller General disagreed with the decision and deducted the amount from other sums due the contractor. The Court, referring to the Comptroller's attempt to "substitute his judgment for that of the contracting officer and thereby eliminate from the case the finding of the contracting officer when the rights of the parties are in this court for adjudication," *id.*, at 898, stated that "action by the comptroller could [not] in any way conclude this court in the determination of the rights of the parties under the contract," *id.*, at 896. The court then applied the *Kihlberg* rule. *Id.*, at 897.

Penn Bridge, then, aside from reaffirming that the same rule of judicial review applied whether the Government or the contractor challenged the finality of a disputes decision, also demonstrates that GAO's view of the correctness of a disputes decision was of no effect in court. GAO's only power—the power of the purse—was to force the contractor to bring suit and thus to obtain judicial review for the Government. But once the case reached court, review was the same for both parties.

GAO's opinion of a disputes decision was irrelevant in court even when GAO favored the contractor. In

Eaton, Brown & Simpson, Inc. v. *United States*, 62 Ct. Cl. 668 (1926), the disputes decision was in favor of the Government, but the Comptroller General disagreed and paid the contractor. In the contractor's suit to recover on other claims, the court held that the disputes decision controlled and deducted the amount GAO had paid from other sums due the contractor. "The action of the comptroller is not conclusive upon this court in determining the rights of the parties. See *Penn Bridge Co.* v. *United States.*" *Id.*, at 685.

In *Carroll* v. *United States*, 76 Ct. Cl. 103 (1932), the Comptroller General disagreed with a disputes decision in favor of the contractor and assessed damages in a sum greater than the amount due under the contract. The contractor brought suit, and the Government argued that it was entitled to the excess. The court replied:

> "The issue is not a new or novel one insofar as judicial precedents are concerned. At least beginning with the case of *Kihlberg* v. *United States* to the present time, the Supreme Court has uniformly held that in Government contracts containing provisions similar to the one in suit, the parties are competent to bind themselves to the conclusiveness and finality of the action and findings of the department with which the contract is made, and that such action is not open to the supervisory power of the courts unless overturned by proof of fraud or such gross error as to warrant the implication of fraud." *Id.*, at 124–125.

In *Albina Marine Iron Works* v. *United States*, 79 Ct. Cl. 714 (1934), the disputes decision was in the contractor's favor, but the Comptroller General disagreed and assessed damages. The court held that the disputes decision

> "was a final disposition of the matter. Neither

> fraud nor bad faith is alleged or proven. The court cannot go behind the decision of the contracting officer where the contract makes him the final arbiter of the facts of the case unless there has been fraud or such gross error which, in effect, would imply bad faith. The cases in this court and the Supreme Court so holding are numerous." *Id.*, at 720.

After repeating that it could not review the disputes decision "without the establishment of fraud or such gross error which would imply bad faith," the court concluded:

> "It is seldom that a case arises like the instant case, where the contractor is upholding the decision of the contracting officer and the Government is attempting to overthrow the decision of the officer appointed and designated by it to contract and carry out the terms of the undertaking. Unless proven to the contrary, full faith and credit should be accorded an officer of the Government in arriving at a decision which requires fair and impartial action on his part." *Id.*, at 721.

In *McShain Co.* v. *United States*, 83 Ct. Cl. 405 (1936), the designated Government official decided that the contractor's delay in completing the contract was unavoidable. The Comptroller General later decided that part of the delay was the contractor's fault and deducted damages from the amount due under the contract. The contractor brought suit, relying upon the finality of the disputes decision. The court said:

> "Neither fraud nor bad faith is alleged or proven. This court and the Supreme Court by numerous decisions have held there is no going behind the decision of the contracting officer when the contract provides that 'his finding of facts therein shall be final and conclusive on the parties thereto.' The action of the Comptroller General was without

legal authority. *Kihlberg* v. *United States; United States* v. *Gleason.*" *Id.*, at 409.[7]

In *B-W Construction Co.* v. *United States,* 97 Ct. Cl. 92 (1942), the Comptroller General deducted damages for delay after a disputes decision in the contractor's favor. The court held that because of the disputes clause "[i]t is . . . the action of the head of the department that is before us for review. On the question now before us that action is binding on us unless we find that it was arbitrary or grossly erroneous. In no event are we bound under this contract by the action of the Comptroller General." *Id.*, at 123.

In *Mitchell Canneries* v. *United States,* 111 Ct. Cl. 228, 77 F. Supp. 498 (1948), the Comptroller General disagreed with a disputes decision in favor of the contractor and set off that amount against other sums due the contractor on other contracts. The court applied "[t]he established principle of law that the findings of fact of a contracting officer are binding upon both the Government and the contractor if there is no fraud, gross error or arbitrariness by the contracting officer amounting to bad faith." *Id.*, at 247, 77 F. Supp., at 502.

These Court of Claims cases are further cogent authority that the Government was, until today, entitled to exactly the same judicial review as contractors. A disputes clause providing for a final decision by a Govern-

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[7] The Court cites *McShain Co.* for the proposition that "[t]he cases deny review" by GAO "absent fraud or overreaching." *Ante,* at 10. Since *McShain Co.* is simply another example of the application of the *Kihlberg* rule against the Government, I am at a loss to understand the Court's statement. As the excerpt I have quoted in the text demonstrates, *McShain Co.* did not "deny review" by GAO; rather, like the other cases, it held that GAO's view of the merits of the disputes decision was irrelevant in court and that the Government could upset the finality of that decision only by proving in court that it was fraudulent.

ment official was equally binding upon both parties. GAO's opinion of that decision was irrelevant in court. GAO's only power was to refuse to sanction payment under a disputes decision favorable to a contractor and thereby compel the contractor to bring suit. Once in court, the standard of review applicable to contractor challenges likewise controlled the Government's challenge.

The district courts reached the identical result. In *James Graham Mfg. Co.* v. *United States,* 91 F. Supp. 715 (ND Cal. 1950), the Comptroller General refused to accept a disputes decision in favor of the contractor. Although the agency adhered to the merits of its decision, it refused to pay because of the Comptroller's contrary view. The court said:

> "Another officer of the United States government, the Comptroller General, who has general control of the government's purse strings, has refused to sanction payment of the account which the Navy Department has approved. The question . . . is: Has he power to determine that payment shall not be made?
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> "The powers of the Comptroller General are extensive and broad. But he does not, absent fraud or overreaching, have authority to determine the propriety of contract payments when the contracts themselves vest the final power of determination in the contracting executive department. United States v. Mason & Hanger Co.; United States v. Moorman." *Id.,* at 716.[8]

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[8] The Court states, *ante,* at 11, that the District Court in *James Graham,* by referring to "fraud or overreaching," referred to instances "where the Comptroller General's power was founded upon specific statutory provisions such as 41 U. S. C. § 53," a statute relating to "kickbacks by Government contractors," *id.,* at 9 n. 8. In

In *Consolidated Vultee Aircraft Corp.* v. *United States*, 97 F. Supp. 948 (Del. 1951), the contractor received an adverse disputes decision from the contracting officer but won reversal on appeal to the agency. GAO disagreed with the agency's decision and refused to pay, forcing the contractor to bring suit. The court held for the contractor on the authority of *Mason & Hanger*, *Penn Bridge*, and *James Graham*. *Id.*, at 951.

C

The law was thus crystal clear. The district courts, the Court of Claims, and this Court consistently applied the rule, originally announced almost a century ago in *Kihlberg*, that contractual clauses providing for the finality of disputes decisions rendered by an employee of one of the parties were enforceable in court, with the judicially created exception for fraudulent decisions. No court, nor even any contractor, ever questioned that GAO could obtain judicial review for the Government simply by refusing to approve payment on a disputes

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fact, however, the District Court not only did not refer to that statute, it did not refer to any statute, nor even intimate that a statute might be relevant. What the District Court did was use the phrase "fraud or overreaching" as shorthand for the *Kihlberg* rule, the judicially created fraud exception to the finality of disputes decisions. That usage is readily apparent from a glance at the District Court's citations: *Mason & Hanger* and *Moorman* from this Court, and *Penn Bridge*, *Carroll*, and *McShain Co.* from the Court of Claims.

The Court also says, *id.*, at 11, that in *James Graham* "summary judgment was entered by the court, which said, 'Since the Navy Department has determined that plaintiff contractor is entitled to the payment sought, this Court must adjudge accordingly.'" The Court omits to quote the immediately preceding sentence in the *James Graham* opinion: "And the Navy Department's decision that these particular dues and contributions are reimbursable is *not arbitrary or unconscionable.*" 91 F. Supp., at 717 (emphasis added). Thus, again, the District Court was referring to the *disputes decision*, and not, as the Court today would have it, to "fraud or overreaching" by the *contractor*.

decision favorable to a contractor. It was accepted by all that the Government and the contractor both were entitled to judicial review.[9] The problem that gave rise to the Wunderlich Act was not *who* was entitled to judicial review nor *how* judicial review was to be attained. The problem was the *scope* of judicial review.

As the Court noted in *United States* v. *Bianchi & Co.*, 373 U. S. 709, 713 (1963), under the *Kihlberg* rule a court's function "in matters governed by 'disputes' clauses was in effect to give an extremely limited review of the administrative decision"; the Court of Claims, however, had "somewhat expanded" the scope of judicial review "over the years." See, *e. g.*, *Needles* v. *United States*, 101 Ct. Cl. 535, 601–607 (1944). It was this expansion of the scope of judicial review that *Wunderlich* addressed.

Certiorari was granted in *Wunderlich* "to clarify the rule of this Court which created an exception to the conclusiveness of such administrative decision[s]." 342 U. S., at 99. The Court gave a restrictive interpretation to this exception.

> "Despite the fact that other words such as 'negligence,' 'incompetence,' 'capriciousness,' and 'arbi-

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[9] The concurring opinion asserts that "[t]he contractor here, according to the long-term understanding of the disputes clause, consented to the disposition of disputes by the contracting officer and by the AEC on appeal, and to the finality of decision at those points." *Ante*, at 21. If the concurring opinion is speaking of pre-Wunderlich Act disputes clauses, the authorities I have cited establish the utter inaccuracy of the assertion. Indeed, the concurring opinion also asserts that "for years, *with the specified exceptions*, [the disputes] clause itself has been regarded as conferring no right of judicial review on the part of the Government." *Id.*, at 20 (emphasis added). The italicized words can only refer to the judicially created exception for fraudulent decisions. The concurring opinion gives no indication that, in either of the assertions, it is referring to the current disputes clause.

> trary' have been used in the course of the opinions, this Court has consistently upheld the finality of the department head's decision unless it was founded on fraud, alleged and proved. So fraud is in essence the exception. By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. The decision of the department head, absent fraudulent conduct, must stand under the plain meaning of the contract." *Id.*, at 100.

Within a month after *Wunderlich* was decided, its restrictive scope of judicial review was applied against the Government. In *Leeds & Northrup Co.* v. *United States*, 101 F. Supp. 999 (ED Pa. 1951), the contractor, after a favorable disputes decision, was reimbursed for certain costs. Several years later, GAO reviewed that decision, disagreed with it, and set off the amount already paid from sums due the contractor on another contract. The contractor was therefore compelled to bring suit. The court first pointed out that GAO's power

> "is subject to the rights of parties to a contract, including the Government, to provide for some designated person or persons, even if in the employ of one of the parties, to make a final determination of any question which may arise between them. This principle has been unequivocally declared by the courts, including the Supreme Court of the United States, in many cases." *Id.*, at 1002.

After quoting extensively from *James Graham*, the court stated the rule of judicial review as follows:

> "The Bureau's determinations of questions of fact under [the disputes clause] are final and conclusive in the absence of fraud. United States v. Wunderlich. For a court to set aside such determinations under [the disputes clause], fraud, meaning conscious wrongdoing or an intention to cheat or be

> dishonest, must be alleged and proved. United States v. Wunderlich." *Id.*, at 1003.

See also *Sunroc Refrigeration Co.* v. *United States*, 104 F. Supp. 131 (ED Pa. 1952), which, following *Leeds & Northrup*, also applied the *Wunderlich* scope of review against the Government.

II

The *Wunderlich* opinion concluded, "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." 342 U. S., at 100. Almost immediately after the decision was issued, congressional legislation was sought to expand the scope of judicial review limited by *Wunderlich* to "fraud" in a narrow sense. I have attached an Appendix detailing the legislative history and shall only summarize that history here.

Although several bills were introduced in the 82d Congress, congressional attention focused upon S. 2487. In its original form, S. 2487 provided:

> "That no provision of any [Government] contract . . . relating to the finality or conclusiveness of any decision of the Government [official], in a dispute involving a question of fact arising under such contract, shall be construed to limit judicial review of any such decision only to cases in which fraud by such Government [official] is alleged."

Wunderlich, of course, construed the standard disputes clause, which purported to make disputes decisions final, to limit judicial review to instances of fraudulent decisions. S. 2487, then, was simply an acceptance of the invitation extended in *Wunderlich* itself. S. 2487, however, did not specify what the scope of judicial review would be, but merely directed that judicial review could not be limited to fraud. Moreover, there was no indication in the language of S. 2487 that it was over-

ruling *Wunderlich* only as to disputes decisions unfavorable to contractors. It obviously applied to the judicial review of "*any* such decision." (Emphasis added.)

The Comptroller General's initial report of GAO's views on S. 2487 made that abundantly clear. The report criticized *Wunderlich* as contrary to the interests of both the Government and contractors. Indeed, as a representative of the Government, the Comptroller General stressed *Wunderlich*'s undesirable impact upon the Government's interest, for administrative "officials can make just as arbitrary determinations in favor of contractors, at the expense of the taxpayers." [10] And, as the Assistant Comptroller General put it in his testimony at the Senate hearings, *Wunderlich* "means that the decision of the administrative officials nearly always will be final because of the extreme difficulty of proving fraud." [11] Because the restricted scope of judicial review prescribed in *Wunderlich* applied to the Government no less than to contractors, GAO had good reason for its concern.[12]

GAO then offered a substitute bill that it believed would protect the Government's interests. The bill provided that a disputes clause decision

> "shall not be treated as binding if the General Accounting Office or a court finds that the action of [the Government official] is fraudulent, arbitrary,

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[10] Hearings on S. 2487 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess., 6.

[11] *Id.*, at 8.

[12] It is misleading to assert, as does the Court, that *Wunderlich* "closed the courthouse doors to *certain citizens*." *Ante*, at 14 (emphasis added). Similarly, the concurring opinion asserts that *Wunderlich* "restricted *contractor*-instigated judicial review" and that the Government "prevailed" in *Wunderlich* with "a narrow judicial review standard for the *contractor*." *Ante*, at 22 (emphasis added). The concurring opinion's assertions are the more surprising in view of its apparent recognition that the Government was subject to the same standard of judicial review as contractors. See n. 9, *supra*.

capricious, grossly erroneous, or that it is not supported by substantial evidence."

GAO's substitute bill thus differed from S. 2487 in two respects. *First,* rather than merely reversing *Wunderlich,* it explicitly defined the expanded scope of review by specifying five grounds upon which a disputes decision could be set aside. Clearly this expanded review was to operate for both contractors and the Government, just as the "fraud" standard of review always had. It would be absurd to suppose that GAO defined the expanded scope of review only for contractors.

Second, GAO's substitute bill authorized GAO review in addition to judicial review. More precisely, it empowered GAO as well as the courts to set aside any disputes decision, whether favorable to the contractor or favorable to the Government. That was a significant expansion of S. 2487. GAO never previously was empowered to upset a disputes decision. Rather, GAO authority was always limited to refusing to sanction payment on a decision favorable to a contractor, thereby forcing him into court. At that point, of course, GAO's view of the merits of the disputes decision was irrelevant. Consequently, GAO's substitute bill, if enacted, would have increased GAO's power enormously, for it effectively authorized GAO to oust the courts of all jurisdiction to review disputes decisions that GAO considered unacceptable. Not surprisingly, this part of GAO's proposal became highly controversial.

Extended hearings on S. 2487 were held in the Senate. Although most of the witnesses and statements concerned themselves solely with urging expanded judicial review for contractors, without adverting to such review for the Government, there were notable exceptions. The Associated General Contractors took the position that judicial review must be available to both parties, as did

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several attorneys who specialized in the representation of contractors.[13] Opponents of that view proposed bills that would have expressly limited the right of judicial review to contractors.[14] The Comptroller General subsequently submitted another report objecting to these bills because their adoption would deprive the Government of the defense of administrative finality while permitting contractors "to utilize such defense should the accounting officers of the Government attempt to question the validity of a payment." [15] It is significant that no one ever suggested during the Senate hearings that the expanded scope of review provided in S. 2487 and GAO's substitute bill was to be available only for contractors and not also for the Government.

An amended S. 2487 was reported out of Committee following the hearings.[16] It provided that no disputes clause

> "shall be pleaded as limiting judicial review of any [disputes] decision to cases in which fraud by [the Government] official . . . is alleged."

Thus, amended S. 2487, like the bill in its original form, contained an explicit reversal of the *Wunderlich* standard of judicial review. Like the original bill, moreover, amended S. 2487 gave not the slightest indication that it was a command solely to the Government not to "plead" the disputes clause as limiting the contractor's right to judicial review. Amended S. 2487 plainly di-

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[13] Hearings on S. 2487, *supra*, n. 10, at 29–32, 68, 83–84, 107, 114.

[14] *Id.*, at 59, 107. Moreover, H. R. 6301, also introduced in the 82d Congress, provided for judicial review only in those instances "in which the contractor shall seek to set aside a decision on a disputed question between the United States and such contractor, made by an officer, board, or other representative of the United States . . . ." Neither House supported this bill.

[15] Hearings on S. 2487, *supra*, n. 10, at 119.

[16] See S. Rep. No. 1670, 82d Cong., 2d Sess.

rected that no disputes clause could be pleaded to limit judicial review of *any* disputes decisions. Neither party, under amended S. 2487, could rely upon a disputes clause to limit the other party's right to judicial review to instances of fraudulent disputes decisions.

Amended S. 2487, however, went beyond the original bill by incorporating GAO's substitute bill:

> "[A]nd any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence."

Thus, amended S. 2487 reversed *Wunderlich,* adopted GAO's definition of the expanded scope of review, and authorized GAO as well as the courts to apply that expanded review and set aside *any* disputes decisions.

The Committee Report on amended S. 2487 expressly noted "that to the same extent [the *Wunderlich*] decision would operate to the disadvantage of an aggrieved contractor, it would also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim." [17] The reversal of *Wunderlich,* then, was clearly seen as an expansion of judicial review that would apply no matter which party, the Government or the contractor, challenged the disputes decision.

The report then explained that the addition of GAO's proposal meant that amended S. 2487 would

> "have the effect of permitting review in the General Accounting Office or a court with respect to any decision of a contracting officer or a head of an agency which is found to be fraudulent, grossly erroneous,

[17] *Id.,* at 2.

> so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the aggrieved party to, in effect, charge him with being a fraud or a cheat in order to affect [*sic*] collection of what is rightfully due." [18]

Thus, the expanded scope of review, explicitly defined, would be available to both parties before either GAO or a court. In short, amended S. 2487 empowered a court to set aside a disputes decision at the behest of either the Government or the contractor, and, likewise, it empowered GAO to set aside a decision challenged by either party. Although the report asserted that amended S. 2487 was intended "simply to recognize the jurisdiction which the General Accounting Office already has," [19] in fact amended S. 2487 would have given GAO the entirely new power to make a binding review of disputes decisions. It would have made GAO, as was later charged, into a second court of claims.

Although the Senate passed amended S. 2487, the 82d Congress expired without House action. When it was reintroduced in the Senate of the 83d Congress,[20] Senator McCarran, the bill's sponsor, observed that the *Wunderlich* decision "cuts two ways" and, as an example, cited a case I have already discussed, *Leeds & Northrup Co.* v. *United States*, 101 F. Supp. 999 (ED Pa. 1951), in which "[t]he Comptroller General . . . attempted to recover on behalf of the Government, because the mistake was against the Government. The contractor interposed a

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[18] *Ibid.*

[19] *Id.*, at 3.

[20] Amended S. 2487 was reintroduced as S. 24, but for ease of reference I will continue to refer to it as amended S. 2487.

defense based on . . . the Wunderlich case. . . . [T]he result was a failure of recovery on behalf of the Government." [21] Thus, Senator McCarran, like GAO, recognized that the narrow review permissible under *Wunderlich* bound both the Government and the contractor, and, like GAO, he considered that reversal of *Wunderlich* would also apply equally to both parties. A month later during floor debate, Senator McCarran again emphasized that while *Wunderlich* could "operate greatly to the disadvantage of contractors," it could also "operate to the disadvantage of the Government." [22] The Senate then passed the bill, obviously with the understanding that the expanded scope of judicial review provided would be available to both the Government and contractors.

Amended S. 2487 was also introduced in the House of the 83d Congress.[23] At the initial House hearing in July 1953, several witnesses asserted that enactment of the bill was essential to enable both the Government and contractors to obtain effective judicial review of disputes decisions.[24] Opposition then developed to the provision empowering GAO to invalidate such decisions. The objection was, quite predictably, that "[t]he effect of the provision is to set up the General Accounting Office as a 'court of claims.' . . . [A]n agency of the legislative branch . . . should not be used to perform functions intended for the judicial branch." [25]

Understanding the precise nature of this objection is important. No one suggested that amended S. 2487

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[21] 99 Cong. Rec. 4573.

[22] 99 Cong. Rec. 6170.

[23] Amended S. 2487 was introduced as H. R. 1839, but for ease of reference I will continue to refer to it as amended S. 2487.

[24] Hearings on H. R. 1839 et al. before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st and 2d Sess., ser. 12, at 3–20.

[25] *Id.*, at 26.

did not grant the Government the same scope of judicial review that it granted contractors. Obviously, since amended S. 2487 authorized both GAO and the courts to exercise the same review, and since the objection was that GAO should not be able to set aside disputes decisions favorable to contractors, it would have been absurd to suggest that amended S. 2487 did not likewise authorize the courts to set aside such decisions. Nor did anyone question the ability of GAO to obtain judicial review for the Government through its power to refuse to approve payment on disputes decisions. All agreed that the purpose of the proposed legislation was to overturn the standard of review set by *Wunderlich;* the narrow scope of judicial review permissible under that case was to be done away with in favor of a broader, specifically defined review. The purpose was to expand judicial review, not to insert further administrative review into the disputes process. Thus, the opposition urged, not unreasonably, that the avowed purpose of overruling *Wunderlich* would not be served by expanding GAO's power to transform it into another court. Hence, deletion of GAO from amended S. 2487 would leave the power of binding review exclusively with the courts.

The Comptroller General bowed to this opposition. Stating (erroneously, I think) that GAO "has not asked for authority which it did not have before the decision in the Wunderlich case," he offered another substitute bill deleting the objectionable provision. He asserted that "this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before" *Wunderlich.*[26] This bill, in the form submitted by GAO with one minor addition, was enacted as the Wunderlich Act.

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[26] *Id.*, at 136.

Thus, the result of GAO's attempt to obtain the power of binding review over disputes decisions was failure. That power was left where it was before the Act, solely with the courts. GAO simply retained the power it had always had, the power to force the contractor into court where the Government would get judicial review of the disputes decision in his favor.

The hearings resumed in January 1954. In urging passage of GAO's revised substitute bill, GAO's General Counsel stated that, despite deletion of the provision for binding GAO review, the bill would not only protect contractors but would also protect the Government "against decisions adverse to the interests of the United States. Certainly the rights of contract[ors] and the Government to review or appeal should be coextensive." [27] Similarly, the Associate General Counsel of the General Services Administration asserted that GAO's revised substitute bill was adequate to "insure an opportunity to protect the Government against excessive generosity," since GAO, under the bill, "could seek a court review by a set-off or by applying to the Department of Justice for recovery in a case where they felt that the action of the contracting officer was grossly erroneous as against the Government." [28]

Many witnesses who opposed GAO's original substitute bill, and thus opposed amended S. 2487, now supported GAO's revised substitute bill because it made clear that the power to set aside disputes decisions was vested exclusively in the courts and not shared by the courts with GAO. There was no suggestion from anyone that deletion of GAO from amended S. 2487 also had the effect of precluding the Government from obtaining judicial review under the standards available to contractors. Any

[27] *Id.*, at 39.
[28] *Id.*, at 59.

such suggestion would have been absurd, for, as noted above, amended S. 2487 granted the courts and GAO exactly the same power. In fact, at one point in the hearings, a witness objected that GAO's revised substitute bill did "not say specifically that an appeal can be taken by an aggrieved contractor." The ensuing colloquy with Committee members made plain that the language of the bill "necessarily include[d] both parties." [29] Moreover, as in the case of the Senate Committee, the House Committee was presented with a proposed bill that would have expressly limited the right of judicial review to contractors.[30] As with the Senate, that suggestion was not adopted. Instead, the Committee reported out the bill, submitted by GAO, that is now the Wunderlich Act.

The Act expanded the scope of judicial review, and that was all it did. The Committee report made that plain. "The committee foresees no possibility of the proposed legislation creating any new rights that a contractor may not have had prior to its enactment, with the exception of the standards of review therein prescribed." [31] Nor did the Act grant GAO new power, for, as the report said, "there is no intention of setting up the General Accounting Office as a 'court of claims.'" On the other hand, the Act did not diminish GAO's existing authority to hold up payment and force the contractor to bring suit, as the report also stressed. "The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office." [32] Thus GAO authority was left exactly where it was.

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[29] *Id.*, at 110.

[30] *Id.*, at 89.

[31] H. R. Rep. No. 1380, 83d Cong., 2d Sess., 6.

[32] *Id.*, at 7.

A point I have already made about deletion of the reference to GAO bears repeating. Amended S. 2487, by incorporating GAO's original substitute bill, granted GAO precisely the same binding power of review that it granted the courts. Contractors did not object to that provision because it authorized GAO to set aside disputes decisions unfavorable to contractors. They objected because amended S. 2487 authorized GAO to set aside disputes decisions *favorable* to contractors. That power, opponents of amended S. 2487 urged, must be vested solely in the courts. They prevailed, and the reference to GAO was deleted. Deletion of the authority granted to GAO obviously could have no effect whatever on the identical authority granted to the courts.[33]

The Senate originally passed amended S. 2487 upon the clear understanding that the expanded scope of judicial review it contained would be available to both the

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[33] The Court's only foray into the legislative history is its assertion that "Congress contemplated giving the General Accounting Office such powers and, indeed, the Senate twice passed—in the form of the McCarran bill—a provision which would have allowed the Comptroller to review disputes decisions to determine if they" satisfied the standards of the Act. *Ante*, at 11. The Court therefore concludes that the Act cannot be construed "to give the Comptroller General powers which Congress has plainly denied." *Id.*, at 12. Similarly, the concurring opinion asserts that "[t]he flat rejection by Congress of the proposed provision for GAO review is significant. There would be no point in that rejection if GAO has the power to defeat the finality of the disputes decision anyway." *Ante*, at 22–23. Unfortunately, the Court and the concurring opinion overlook that the proposed provision was not simply "for GAO review." It was for *binding* GAO review. Because it was not enacted, GAO does *not* "have a veto of AEC's 'final' decision," *ante*, at 9 (opinion of the Court); GAO does *not* have "power to defeat the finality of the disputes decision," *ante*, at 23 (concurring opinion). Both the Act and the disputes clause specifically provide that only a *court* can set aside a disputes decision. And that is precisely the point the legislative history makes clear.

Government and contractors. When the House bill came to the Senate after deletion of the GAO provision, Senator McCarran, who had previously stressed that *Wunderlich* hurt both the Government and contractors, explained that while the House bill differed from the bill passed by the Senate, since it deleted the authority to GAO, it was "designed to accomplish the same purpose." [34] That purpose, of course, was to overturn *Wunderlich* and to provide the courts with grounds of review in addition to fraud. The two bills could not, of course, "accomplish the same purpose" if the House bill authorized expanded judicial review only for contractors, leaving the Government either with the *Wunderlich* standard or with no review at all. After Senator McCarran responded affirmatively to the statement that the difference was only "a modification of the language in the Senate bill, and the two bills agree in their effect," [35] the Senate passed the House bill.

The text of the Act is its own witness to the congressional purpose. It provides that no clause in a Government contract purporting to make final an administrative determination of a dispute arising under the contract "shall be pleaded in any suit . . . as limiting judicial review." The proviso then defines the applicable scope of review.

It is impossible to read the plain words of this statute as directing that judicial review is available only for disputes decisions unfavorable to contractors. Indeed, the language is so clear that there should be no need to search through the legislative history for a contrary meaning.[36] That history, in any event, demonstrates that the Act means exactly what it says.

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[34] 100 Cong. Rec. 5717.

[35] 100 Cong. Rec. 5718.

[36] The need arises in this case only because petitioner argues that, despite the clear language of the Act, the legislative history reveals that Congress meant to reserve the right of judicial review solely

Two significant considerations buttress my conclusion that the Court's construction of the Act is patently and grievously erroneous.

First. The bill that became the Wunderlich Act was a *Government* bill. As the Committee report said, the Act, with a minor exception, "is exactly the same legislation suggested by the Comptroller General." [37] GAO offered it as a substitute for the original S. 2487 because of *Government* concern that administrative "officials can make just as arbitrary determinations in favor of contractors, at the expense of the taxpayers." [38] The bill explicitly stated that the expanded scope of review would add to "fraudulent" the grounds that the disputes decision was "arbitrary," "capricious," "grossly erroneous," or "not supported by substantial evidence." After GAO modified the bill to delete the provision authorizing GAO review, in addition to court review, on those grounds, *Government* procurement agencies joined forces with GAO in strong support of passage. It is absurd to suppose that the *Government* pressed for a bill that granted *contractors* an expanded scope of judicial review, inserted in the bill by the *Government*, yet denied the *Government* judicial review on those same grounds.

Second. That absurdity is compounded by the consequences that result from interpreting the Act to deny

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to contractors. It is thus somewhat odd that the Court considers it worthwhile to assert "that the Act's legislative history 'has something for everyone' " and that the Court "find[s] the Act's history at best ambiguous." *Ante*, at 13 n. 9. The concurring opinion likewise professes to find the legislative history "decidedly ambiguous at best," *ante*, at 22, yet nevertheless goes on to assert that Congress "*intended* to relieve *contractors*" and "opened the door to the *contractor*," *ibid.* (emphasis added). These comments are all the more inexplicable because neither the Court nor the concurring opinion attempts even the most cursory analysis of the text of the Act itself.

[37] H. R. Rep. No. 1380, *supra*, n. 31, at 6.

[38] See n. 10, *supra*.

the Government judicial review of disputes decisions. Before *Wunderlich*, the Government could challenge the finality of those decisions at least on the ground of fraud. If the Act affords only contractors judicial review and denies review to the Government, it follows that the Government has been deprived even of the right it had under *Wunderlich* to challenge "fraudulent" disputes decisions. The principal Government procurement agencies, now including the Atomic Energy Commission, have created contract appeals boards as the final level of agency review of disputes decisions. Because the Act expressly provides for judicial review of such "board" decisions, interpreting it to deny the Government review means that however "fraudulent," however "arbitrary," however "capricious," however "grossly erroneous," however clearly "not supported by substantial evidence" the board's determination, the procurement agency and the Government itself are helpless to redress the wrong. In this case, that might mean the loss of more than one million dollars to American taxpayers. But at stake are countless millions. To say that *Government* wrote and secured passage of a bill to work that result is preposterous.[39]

III

So far as I can penetrate the Court's opinion, its primary premise is exposed by such sentences as these: "The purpose of avoiding 'vexatious litigation' would

[39] The concurring opinion asserts that "[i]n the exercise of its legislative judgment, Congress has determined that in this area the Government," unlike contractors, does not need the Act's protection "against fraud, capriciousness, arbitrariness, bad faith, and absence of evidence." *Ante*, at 23. As the concurring opinion never refers to the language of the Act, and finds the legislative history "not at all that clear," "decidedly ambiguous at best," *id.*, at 22, and "inconclusive," *id.*, at 23, it is difficult to understand the basis for this statement.

not be served, however, by substituting the action of officials acting in derogation of the contract." *Ante,* at 8.[40] "Neither the Wunderlich Act nor the disputes clause empowers any other administrative agency to have a veto of AEC's 'final' decision or authority to review it." *Id.,* at 9. "In other words, we cannot infer that by some legerdemain the disputes clause submitted the dispute to further administrative challenge or approval . . . ." *Ibid.* "Here, the AEC spoke for the United States and its decision, absent fraud or bad faith, should be honored." *Id.,* at 10.[41] "Since the AEC withheld payment solely because of the views of the Comptroller General and since he had been given no authority to function as another tier of administrative review, there was no valid reason for AEC not to settle with petitioner according to its earlier decision." *Ibid.*[42] "That action by the

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[40] This statement, albeit obscurely, may mean that the purpose of avoiding litigation would not be served by subjecting a disputes decision in *favor* of the contractor to judicial review, for that would be litigation. Yet just as obviously the purpose of avoiding litigation would not be served by subjecting a disputes decision *against* the contractor to judicial review.

[41] See n. 4, *supra,* n. 43, *infra.*

[42] This is a difficult statement to understand. Assume that the Commission had "no valid reason" not to pay petitioner. Was the Commission's nonpayment in violation of the contract? Was it in violation of the Wunderlich Act? The Court does not say. If nonpayment violated neither the contract nor the Act, it seems rather strange that this Court should order the Commission to pay. The Court's statement appears to be connected with its later statement that "[t]he AEC has not, to this day, repudiated the merits of its decisions in favor of petitioner." *Ante,* at 19. Again, however, the Court does not say how or even whether the Commission's "nonrepudiation" violated the contract or the Act.

In the same vein, the concurring opinion asserts that there is "a possible breach of contract" in this case: "When the United States then disavows the Commission's decision—a decision which, as the Court notes, to this day has never been withdrawn or repudiated by the AEC—it seems to me that the Government imposes

Comptroller General was a form of additional administrative oversight foreclosed by the disputes clause." *Id.*, at 12. "[The Act] should not be construed to require a citizen to perform the Herculean task of beheading the Hydra in order to obtain justice from his Government." *Id.*, at 14. "We are reluctant to construe a statute enacted to free citizens from a form of administrative tyranny so as to subject them to additional bureaucratic oversight, where there is no evidence of fraud or overreaching." *Id.*, at 14.[43] "This objective [preventing the inflating of bids] would be ill served if Government contractors—having won a favorable decision before the agencies with whom they contracted—had also to run the gantlet of the General Accounting Office and the Department of Justice." *Id.*, at 14–15.

The Court's *bête noire*, then, is primarily the General Accounting Office, with a sideswipe at the Department of Justice. We are left to infer, I gather, that Congress shared the Court's distaste for the activities of those agencies in these cases and enacted the Wunderlich Act, not only to arm contractors with expanded grounds of judicial review of disputes decisions favorable to the Government, but also, by the device of denying judicial review to the Government, to abolish the authority of GAO to disapprove payments to contractors under disputes decisions, thus forcing contractors to sue, and, by that device, to relieve the Department of Justice of any suits

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something to which the contractor has not agreed." *Ante*, at 21, 22. The concurring opinion, however, does not say how the Government's "disavowal" violated the contract.

[43] If this statement implies that a contractor *is* "subject . . . to additional bureaucratic oversight, where there *is* . . . evidence of fraud or overreaching" (emphasis added), one might well ask why that is so. Fraud is only *one* of the five grounds of judicial review specified in the Act and the disputes clause. Obviously either all or none are available. See n. 4, *supra*.

to defend on behalf of the United States. There are three dispositive answers to the Court's supposition.

First. The notion that Congress enacted the Wunderlich Act to abolish the authority of GAO and the Department of Justice is completely a figment of the Court's own imagination. As the judicial history shows, both agencies have exercised for decades powers identical to those exercised in this case, with no prior complaints that I can discover and with complete congressional approval. I need only quote from the Committee report that accompanied the bill that is now the Wunderlich Act.

> "The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.
>
> "The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. *It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a 'court of claims.'* Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision.

> *"The specific intent of this legislation, insofar as it affects the General Accounting Office, is explicitly stated in the letter . . . from the Comptroller General himself . . . ."*

The report then quoted from the Comptroller General's letter, in which he said that GAO "has not asked for authority which it did not have before the decision in the Wunderlich case," and in which he quoted from the Senate Committee's report on amended S. 2487:

> "[I]t is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; [it] is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has." [44]

Second. The case law detailed earlier in this opinion, including *Eaton, Brown & Simpson, Inc.* v. *United States*, 62 Ct. Cl. 668 (1926), in which GAO disagreed with a disputes decision in favor of the Government and paid the contractor, establishes without question that GAO has no power to overturn a disputes decision. The limit of its authority is to refuse to sanction payment to the contractor and thus force him to bring suit. The judicial precedents in this Court, the Court of Claims, and the district

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[44] H. R. Rep. No. 1380, *supra*, n. 31, at 6–7 (emphasis added). This detailed refutation that GAO authority was being curtailed was necessary to allay the fears expressed by the attorney who argued *Wunderlich* for the contractor. He testified during the House hearings that deletion of GAO from amended S. 2487, passed by the Senate, might be misconstrued as depriving GAO of its prior authority to refuse to sanction payment and thereby "throw the matter into court." See Appendix, *infra*, at 78–80. Today's decision fulfills his prophecy.

courts are explicit that only a court can determine the merits of the dispute within the grounds of review specified by the Wunderlich Act. It is therefore completely irrelevant that "the AEC withheld payment solely because of the views of the Comptroller General." *Ante*, at 10. Indeed, the Court exposes the fallacy of its own position when it states that "the disputes clause in the contract says that the decision of the AEC is 'final and conclusive,' unless a *court* determines that the award is vulnerable under §§ 1 and 2 of the Act." *Id.*, at 3–4 (emphasis added). See also *id.*, at 9: "By the disputes clause the decision of AEC is 'final and conclusive' unless 'a *court* of competent jurisdiction' decides otherwise for the enumerated reasons." (Emphasis added.)

Third. Similarly, the Court states, in response to the Government's nonexistent contention that the Department of Justice has "the power to overturn decisions of coordinate offices of the Executive Department," *id.*, at 12, "That power [of the Department of Justice to defend suits against the United States] is pervasive but it does not appear how under the Wunderlich Act it gives the Department of Justice the *right to appeal* from a decision of the Atomic Energy Commission," *id.*, at 12–13 (emphasis added). See also *id.*, at 13: "The *power to appeal* to the Court of Claims a decision of the federal agency under a disputes clause in a contract which the agency is authorized to make is not to be found in the Wunderlich Act and its underlying legislative history." (Emphasis added.) No one suggests that the Department of Justice has a "right to appeal." It is involved in this case only because GAO's refusal to sanction payment forced petitioner to sue the United States, thus creating a lawsuit that the Department of Justice, as the Government's lawyer, had a duty to defend. It would be strange if the Department had a duty to confess judgment.

In support of its construction of the Act, the Court

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makes a statement, which I have already quoted, that invites a further comment:

> "[J]udicial review was provided so that contractors would not inflate their bids to take into account the uncertainties of administrative action. This objective would be ill served if Government contractors—having won a favorable decision before the agencies with whom they contracted—had also to run the gantlet of the General Accounting Office and the Department of Justice." *Id.*, at 14–15.

Contractor witnesses at the committee hearings asserted that contractors would have to inflate their bids if they could attack a disputes decision only on the ground that it was fraudulent. As the Court says, the Act resolved this problem by expanding the scope of judicial review, so that contractors can attack a disputes decision on grounds in addition to fraud. *That* was the protection Congress gave contractors so that they would not have to inflate their bids.

After recognizing this, the Court says that because contractors got expanded judicial review to prevent the necessity of inflating bids, they *also* got the benefit of not having decisions in their favor subject to judicial review *at all,* since otherwise the objective of preventing inflated bids "would be ill-served." It would be difficult to imagine a more obvious *non sequitur.* The Court could as easily say that "[t]his objective would be ill served" if the contractors ever lost a disputes decision.

I might add that the Court does not say that the "objective would be ill served" if favorable contractor decisions were subject to *judicial review;* it says that the "objective would be ill served" if contractors "had also to run the gantlet of the General Accounting Office and the Department of Justice." Yet what the Court means, of course, is judicial review, for neither GAO nor

the Department of Justice can take a favorable decision away from a contractor. Only a *court* can do that.

The Court is forced to go to extreme lengths to assert that the Government still may have relief for fraud. That is because the Court concedes, as it must, that its construction of the Act denying the Government judicial review forecloses review of disputes decisions that are "fraudulent," just as it forecloses judicial review of decisions that are "arbitrary," "capricious," "grossly erroneous," or "not supported by substantial evidence." The Court's attempted escape is to suggest that the Government may have relief for fraud under the statutes in which "Congress has made elaborate provisions for dealing with fraudulent claims of contractors." *Id.*, at 16. Apart from the absence of any explanation why, if statutory remedies were always available, this Court found it necessary to fashion, for Government and contractor alike, a judicial exception to the finality of disputes decisions, the point is frivolous.[45] Obviously the fraud statutes the Court mentions have no application whatever to the fraud we are discussing in this case.

The "fraud" that is an issue in a disputes clause case is *not* contractor fraud. Not one case construing a disputes clause, from 1878 to the present day, ever mentions "fraud" by the *contractor*. Nor has anyone ever sug-

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[45] The Court asserts that "[i]f the Comptroller General has the broad, roving, investigatory powers that are asserted, specific statutory grants of authority such as this provision [41 U. S. C. § 53] relating to kickbacks would be superfluous." *Ante*, at 10 n. 8. The GAO authority asserted here, however, is simply the authority to refuse to sanction payment under a disputes decision on the ground that the decision does not satisfy the standards of the Wunderlich Act. The Act, of course, has nothing whatever to do with illegal activities of contractors. It concerns only the finality of administrative *disputes decisions*. Enforcement of the Act obviously would not make the statutory prohibition of kickbacks "superfluous."

gested that the Government needs judicial review of disputes decisions to guard against fraud by the *contractor*. The "fraud" that is involved is a *fraudulent decision*. The disputes clause and the Act itself provide judicial review to determine whether the *"decision . . .* is fraudulent." (Emphasis added.) When a disputes decision is challenged, the only questions concern that *decision:* was it "fraudulent"? was it "capricious"? was it "arbitrary"? was it "grossly erroneous"? was it "not supported by substantial evidence"? [46] The Court is absolutely right that "[a] contractor's fraud is of course a wholly different genus than the case now before us." *Id.*, at 15.

IV

The time-tested standards of statutory construction require interpretation of the statutory wording to effect the congressional purpose as revealed by legislative history. The Court totally discards those standards in construing the Wunderlich Act. Instead, the Court purports to discover a nonexistent hostility of Congress toward the "intermeddling," *id.*, at 19, of GAO and the Department of Justice in the disputes process and for that reason a congressional purpose to prevent the subjection of "citizens . . . to additional bureaucratic oversight," *id.*, at 14. The virtually century-long judicial history that forms the background of the Act, its explicit language, and its clear legislative history completely refute the proposition. I dissent and would affirm the judgment of the Court of Claims.

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[46] Even my Brother DOUGLAS once recognized this:

"We should allow the Court of Claims, the agency close to these disputes, to reverse *an official whose conduct* is plainly out of bounds whether *he* is fraudulent, perverse, captious, incompetent, or just palpably wrong." *United States* v. *Wunderlich, supra,* at 102 (dissenting opinion) (emphasis added).

APPENDIX TO OPINION OF BRENNAN, J., DISSENTING

Within two months after the decision in *United States* v. *Wunderlich*, 342 U. S. 98 (1951), six bills to expand the scope of judicial review of agency disputes decisions were introduced. S. 2432 (Sen. Chavez); S. 2487 (Sen. McCarran); H. R. 6214 (Rep. Celler); H. R. 6301 (Rep. Springer); H. R. 6338 (Rep. Wilson); H. R. 6404 (Rep. Walter). Hearings were held in the Senate on S. 2487. Hearings on S. 2487 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 2d Sess. (1952). S. 2487 provided:

> "That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the Government contracting officer, or of the head of the department or agency of the United States concerned or his representative, in a dispute involving a question of fact arising under such contract, shall be construed to limit judicial review of any such decision only to cases in which fraud by such Government contracting officer or such head of department or agency or his representative is alleged." *Id.*, at 1.

The Comptroller General's report to the Judiciary Committee, setting forth GAO's views on S. 2487, stated that GAO felt that the result of the *Wunderlich* decision was "undesirable both as to the contractor's interests and the interests of the Government." *Id.*, at 5–6. The Comptroller General stressed the latter interest.

> "I am as deeply concerned, however, that the rule allows the contracting officials uncontrolled discretion over the Government's contractual affairs as well and places them in a position to make as arbitrary and reckless use of their power against the

> interests of the Government as against the interests of the contractor. In other words, deciding officials can make just as arbitrary determinations in favor of contractors, at the expense of the taxpayers." *Id.*, at 6.

The report concluded that GAO considered S. 2487

> "inadequate and . . . objectionable because no provision is made therein for a review of decisions of administrative officers by the General Accounting Office. Without a provision to that effect the General Accounting Office in performing its statutory functions would be precluded from questioning the propriety or legality of payments made to a contractor as the result of an arbitrary or grossly erroneous decision on the part of the contracting officer." *Id.*, at 7.

The report recommended a substitute bill, which provided that

> "Any stipulation in a Government contract to the effect that disputed questions shall be finally determined by an administrative official, representative or board shall not be treated as binding if the General Accounting Office or a court finds that the action of such officer, representative or board is fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence." *Ibid.*

Frank L. Yates, the Assistant Comptroller General, expanded on the report in his testimony before the Subcommittee. He asserted that prior to *Wunderlich* disputes clause decisions on questions of fact arising under Government contracts "were not disturbed by the General Accounting Office or the courts unless the action of the administrative officer was fraudulent, arbitrary, capricious, grossly erroneous, or without foundation in fact."

Wunderlich, Mr. Yates said, "means that the decision of the administrative officials nearly always will be final because of the extreme difficulty of proving fraud." *Id.*, at 8. And, he continued, "the rule works both ways," for "[a] deciding administrative official can make decisions adverse to the Government as well as to contractors, in which event an improper decision results in a burden, an improper burden, to the taxpayers of the country." *Id.*, at 9. Thus, he said, "it appears that the executive contracting agencies without specific legislation authorizing them to do so, may, by agreement with the contractor, circumvent the operations of courts and the General Accounting Office to the serious detriment of both private business and the Government." *Id.*, at 9–10. Mr. Yates explained that GAO's substitute bill would restore "to the courts and to the General Accounting Office . . . their normal and proper jurisdiction," for:

> "[I]t would permit [administrative officers] to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, et cetera. Such a law not only would protect a contractor from fraudulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office . . . but it would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contractors and the Government to review or appeal should be coextensive." *Id.*, at 11.

The managing director of the Associated General Contractors, H. E. Foreman, testified that the construction industry had for many years attempted without success to secure changes in the standard disputes clause. The

industry's latest proposed disputes clause, which Mr. Foreman read at the hearing, provided "[t]hat nothing in this contract . . . shall void the right of either party to this contract carrying the dispute before a court of competent jurisdiction." *Id.*, at 24. The association's general counsel, John C. Hayes, stated that its position was "that any decision made by a contracting officer or head of a department, agency, or bureau, should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based." *Id.*, at 29. In amplifying on this position, Mr. Hayes testified that only "by permitting judicial review of the contracting officer's decision . . . can the rights of both the contracting parties be protected." Although he then referred to the need for legislation that would authorize the courts to "enter judgment against the United States on any claim in which the contractor shall seek a review" of a disputes decision, he immediately added that the legislation should provide "that any provision in any contract with the United States abridging the right of the parties to court review shall be null and void." *Id.*, at 30. Finally, in commenting on GAO's proposed substitute bill, Mr. Hayes said that the association "would welcome further administrative review," but that contractors also "should be permitted our judicial review, whether it be the government or whether it be the contractor, it doesn't make any difference. It has to cut both ways . . . ." *Id.*, at 31. Replying to a specific question, Mr. Hayes denied that judicial review "was a one-way street in favor of the contractor," repeating that "it cuts both ways." He concluded that the association wished "to take the position of being absolutely fair in urging legislation that will protect the rights of both Government and contractor." *Id.*, at 32.

There was much discussion of GAO's substitute bill and GAO's role in the review of agency disputes decisions. A former counsel to the Comptroller General, O. R. McGuire, testified that GAO's review should be limited to questions of law and that GAO should "accept the facts, unless, of course, there is fraud, or just gross mistake." *Id.*, at 41. John W. Gaskins, who was on the brief for Wunderlich in the Supreme Court, proposed a revision of GAO's substitute bill specifically granting both GAO and the courts "jurisdiction to set aside any [administrative] decision" that did not comport with the standards set out in GAO's bill. *Id.*, at 68. Gardiner Johnson, an attorney who specialized in the representation of contractors, testified that, as he understood GAO's position, GAO "simply wanted practically the same right that the contractors are requesting, to take an appeal from what they consider to be an unfair and unreasonable decision." *Id.*, at 84. As so understood, he said, "our people have no basic quarrel with that. We are against all forms of unfair, unreasonable decisions either against the Government and the taxpayer or against the contractor." *Id.*, at 83.

Most of the witnesses and most of the submitted statements, however, were concerned only with protecting contractors. *E. g., id.*, at 2–3, 62, 70–75, 85–87, 119–136. A few witnesses went even further. Robert E. Kline, Jr., an attorney representing the National Association of River and Harbors Contractors, proposed amendments to S. 2487 designed "to assure full restoration to Government contractors of their inherent right to judicial review of unjust decisions by Government contracting officers and department heads." *Id.*, at 58. These amendments specifically limited the legislation to contractors' suits in which a court would "enter judgment against the United States." *Id.*, at 59. Alan Johnstone, an attorney representing a contractor, initially suggested that the legisla-

tion "should provide . . . simply that all administrative determinations in the performance of a contract with the United States shall be subject to review by the Comptroller General and by the courts, according to law, the provisions of any such contract to the contrary notwithstanding." *Id.*, at 61–62. Mr. Johnstone returned to testify later and, although expressing a preference for a "bill mak[ing] justiciable any grievance which either of the parties to the contract would have," submitted two proposed bills on behalf of himself, Mr. McGuire, and Mr. Gaskins, both of whom had already testified, and Harry D. Ruddiman, who subsequently testified at the House hearings. These proposals made judicial review available only to contractors, one providing that "the United States shall not employ as a defense the finality of" agency decisions, the other that "the United States shall not avail itself of the defense of the finality of such decision[s]." *Id.*, at 107.

In contrast, the Associated General Contractors, adhering to the position its representatives had taken at the hearings, submitted a resolution adopted at its annual convention stating that any disputes decision "should be subject to judicial review, in order to guarantee that such decision is reasonable, made with due regard to the rights of both the contracting parties, and supported by the evidence upon which such decision was based," and urging legislation that would provide "that any provision in any contract with the United States abridging the rights of the parties thereto to court review shall be null and void." *Id.*, at 114.

After the hearings concluded, the Comptroller General sent the Committee a copy of his report to the Chairman of the House Judiciary Committee dealing with the House bills. *Id.*, at 116–119. This report reiterated many of the comments made in the Comptroller General's earlier report to the Senate Committee. The re-

port also objected to the two proposed bills, submitted by Mr. Johnstone, limiting judicial review to contractors on the ground that "the Government would be precluded from employing the finality of the administrative decision as a defense to a suit, [while] the contractors would be free to utilize such defense should the accounting officers of the Government attempt to question the validity of a payment made to a contractor." The report, as did the prior one, recommended adoption of GAO's substitute bill. *Id.*, at 119.

S. 2487 was reported out in amended form, incorporating the substance of GAO's proposal. As amended, S. 2487 provided

> "That no provision of any contract entered into by the United States, relating to the finality or conclusiveness, in a dispute involving a question arising under such contract, of any decision of an administrative official, representative, or board, shall be pleaded as limiting judicial review of any such decision to cases in which fraud by such official, representative, or board is alleged; and any such provision shall be void with respect to any such decision which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. . . ." S. Rep. No. 1670, 82d Cong., 2d Sess., 1 (1952).

The Committee report stated that "[t]he purpose of the proposed legislation is to overcome the inequitable effect, under a recent Supreme Court decision, of language in Government contracts which makes the decision of the contracting officer or the head of the agency final with respect to questions of fact." *Ibid.* The report pointed out "that to the same extent [the *Wunderlich*] decision

would operate to the disadvantage of an aggrieved contractor, it would also operate to the disadvantage of the Government in those cases, as sometimes happens, when the contracting officer makes a decision detrimental to the Government interest in the claim." *Id.*, at 2. The report further explained that:

> "S. 2487 will have the effect of permitting review in the General Accounting Office or a court with respect to any decision of a contracting officer or a head of an agency which is found to be fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence. In other words, in those instances where a contracting officer has made a mistaken decision, either wittingly or unwittingly, it will not be necessary for the aggrieved party to, in effect, charge him with being a fraud or a cheat in order to affect [*sic*] collection of what is rightfully due." *Ibid.*

Finally, the report stressed that amended S. 2487 was "not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office . . . but simply to recognize the jurisdiction which the General Accounting Office already has." *Id.*, at 2–3.

Although the Senate, without debate, passed amended S. 2487, 98 Cong. Rec. 7783–7784; *id.*, at 9059, the House did not act upon it during the 82d Congress. It was reintroduced in the Senate of the 83d Congress as S. 24. The Committee report was, with formal changes, identical to the report on amended S. 2487. S. Rep. No. 32, 83d Cong., 1st Sess. (1953). Senator McCarran, the bill's sponsor, explained on the floor that the effect of the *Wunderlich* decision was to require "that the aggrieved party allege and prove that some Government employee deliberately cheated, or intended to defraud

him, in order to get a court review of the question." 99 Cong. Rec. 4572. He also noted that:

> "Senators who have looked into this matter know that this decision of the Supreme Court cuts two ways. It can hurt the Government badly, as well as doing an injustice to contractors. In a recent case . . . [t]he Comptroller General . . . attempted to recover on behalf of the Government, because the mistake was against the Government. The contractor interposed a defense based on . . . the Wunderlich case. . . . [T]he result was a failure of recovery on behalf of the Government.
>
> "It was because of this case . . . that the Comptroller General . . . testified before the Judiciary Committee in behalf of this bill." *Id.*, at 4573.

Later the same day, however, Senator McCarran stated that the Air Force "objected to the fact that the bill gave the Comptroller General the same right that was given to a contractor to question a decision of a contracting officer." *Id.*, at 4598. He also stated that "the Comptroller General feels that in order to protect the interests of the Government, it is necessary that he shall have as much right to question the decision of a contracting officer . . . as may be given to the private party to the contract." *Id.*, at 4599. When S. 24 reached the floor a month later, Senator McCarran again emphasized that while the *Wunderlich* decision could "operate greatly to the disadvantage of contractors," it could also "operate to the disadvantage of the Government." *Id.*, at 6170. The Senate then passed the bill. *Id.*, at 6201.

Representative Reed introduced amended S. 2487 in the House as H. R. 1839, and hearings were held on it and two related bills, H. R. 3634 (Rep. Celler) and H. R. 6946 (Rep. Willis). Hearings on H. R. 1839 et al. before Subcommittee No. 1 of the House Committee on

the Judiciary, 83d Cong., 1st and 2d Sess., ser. 12 (1953, 1954).

At the initial hearing in July 1953, all witnesses supported the bill. Elwyn L. Simmons, a contractor, asserted that, because of "incompetent or negligent or capricious agency representative[s]," the *Wunderlich* decision could "work as readily against the Government's interests as against that of the contractor" and that "only your immediate legislative action through enactment of H. R. 1839 or S. 24 can now protect both the Government and the contractor from this . . . unprecedented situation." *Id.*, at 4. Referring to the Senate debates on S. 24, Mr. Simmons noted

> "that there was some objection by contractors doing business with the Air Force to the inclusion of the GAO under the provisions of this bill. I do not know what basis these Air Force contractors have for their objection, but we as general contractors are used to the GAO in our business and their auditing staff and forms no basis for our objection." *Id.*, at 5.

George P. Leonard, an officer of the Wunderlich Contracting Co., testified that because of *Wunderlich* "neither the Government through the GAO, nor the contractors through the courts, have any right to appeal from contracting officers' decisions even though they may be grossly erroneous." *Id.*, at 7. He added that he saw "no reason why anybody should object to either the General Accounting Office or the courts passing on these decisions of the contracting officers." *Id.*, at 8.

Harry D. Ruddiman, who argued for Wunderlich before the Supreme Court, submitted a prepared statement asserting that unless H. R. 1839 was enacted, "not only the contractor but also the Government, will be unable to obtain effective judicial review of contracting officers' decisions." In his view, H. R. 1839 "would restore to

the courts an effective review of determinations made by contracting officers." *Id.*, at 12. Although, in light of the Senate reports on amended S. 2487 and S. 24, Mr. Ruddiman discounted "[f]ears . . . that the reference to the General Accounting Office in S. 24 would give it powers with respect to the review of payments under Government contracts beyond those which it already possesses," he suggested in his statement that "any doubt on the matter . . . can very easily be removed by striking out the words 'the General Accounting Office or' " in H. R. 1839. *Id.*, at 13. In his testimony, however, Mr. Ruddiman expressed reservations about removing GAO from the bill.

> "Lastly, I would like to deal with an objection which has been raised to including the General Accounting Office in the provisions of this bill. I don't know just exactly what the basis of the objection is, but in my opinion, any fears along that line are groundless. As I see it, the General Accounting Office, as a matter of practice, in reviewing contracts and change orders for purposes of payment, is always going to apply the standards of review that are granted to the courts. That has been their practice before the Wunderlich decision. They figured if there was good reason to doubt the finality of the decision, the matter ought to be referred to the courts. I think that is all that would be done by the language of this bill.
>
> "At one time I thought there would probably be no objection to striking out the reference to the General Accounting Office as mentioned in S. 24 or H. R. 1839. I felt that even if you had no reference, the General Accounting Office would still exercise that same jurisdiction. However, in view of the fact that the Senate has already passed a bill which has included a reference to the General Ac-

> counting Office, I think it would be dangerous now to eliminate the General Accounting Office from the provisions of this bill. It might be misconstrued as taking away this jurisdiction from the General Accounting Office." *Id.*, at 16.

Representative Graham, a committee member, replied that it was "needless to refer to" GAO anyway. *Ibid.* Mr. Ruddiman, however, adhered to his view in a letter to the Subcommittee the following day.

> "I feel that if the bill, as passed by the Senate, had contained no reference to the General Accounting Office, and the House of Representatives had passed such a bill without amendment, the General Accounting Office as a practical matter would, in reviewing payments under Government contracts and change orders, employ these same standards of review that are granted by the bill to the courts. Thus, if the General Accounting Office was confronted with an administrative decision which it thought would be set aside by the courts, it would refuse to make payment and throw the matter into court. However, since the Senate, in passing S. 24, has expressly included the General Accounting Office in the bill, some doubt as to the General Accounting Office jurisdiction might arise if the House of Representatives should then strike out all reference to the General Accounting Office. There would then be the possibility that this action would be construed as limiting review by the General Accounting Office to the ineffective ground of fraudulent intent prescribed by the Wunderlich decision. It is therefore my suggestion that the bill be passed without change in the language employed by the Senate." *Id.*, at 17.

Alan Johnstone, the final witness of the day, likewise

urged that GAO be left in H. R. 1839. *Id.*, at 18. He said that "this bill would throw wide the portals of the courts of justice to anyone, including the Government, which has a grievance," and, referring, as had Senator McCarran, to *Leeds & Northrup Co.* v. *United States*, 101 F. Supp. 999 (ED Pa. 1951), in which a contractor successfully asserted a *Wunderlich* defense, he said "that what is sauce for the goose is sauce for the gander." *Id.*, at 19.

Opposition to H. R. 1839 was also becoming apparent. Among the letters sent to the Committee, *id.*, at 22–30, all calling for legislation to protect the rights of contractors, was one urging deletion of the reference to GAO because "[t]he effect of the provision is to set up the General Accounting Office as a 'court of claims.' . . . [A]n agency of the legislative branch . . . should not be used to perform functions intended for the judicial branch." *Id.*, at 26.

Shortly before the hearings resumed in January 1954, the Comptroller General wrote the Chairman of the Committee about H. R. 1839. He noted that "there was considerable opposition to the bill from some quarters . . . on the basis . . . that the General Accounting Office should not be given express authority by statute to review and overrule the determinations of administrative officials." *Id.*, at 135. He responded that GAO "has not asked for authority which it did not have before the decision in the Wunderlich case," and he referred to the statement in the Senate reports that the bill would not affect GAO's jurisdiction. Nevertheless, he then presented a substitute bill, to which he said there would be little or no opposition by industry groups and administrative agencies. He stated that "this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in

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precisely the same situation it was in before" *Wunderlich. Id.*, at 136. GAO's proposed bill provided:

> "That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. . . ." *Ibid.*

With the addition of the words "in any suit now filed or to be filed," added to deal with retroactivity problems, see, *e. g., id.*, at 48, 82, GAO's bill eventually was enacted as the Wunderlich Act.

In commenting upon GAO's bill, E. L. Fisher, GAO's general counsel, reiterated much of the testimony of the Assistant Comptroller General, Mr. Yates, at the Senate hearing. Mr. Fisher, as had Mr. Yates, stressed that the *Wunderlich* "rule works both ways. A deciding administrative official can make decisions adverse to the Government as well as to contractors." *Id.*, at 38. Mr. Fisher, in language virtually identical to that earlier used by Mr. Yates, urged passage of either H. R. 1839 or GAO's proposed substitute because they

> "would permit [administrative officers] to make determinations on questions of fact which would have final effect if the decisions were not found by the General Accounting Office or the courts to be fraudulent, arbitrary, capricious, and so forth. Such a law not only would protect a contractor from fraud-

> ulent, arbitrary or capricious action by giving him, in addition to resort to the courts, a further administrative remedy before the General Accounting Office, and would also provide a protection, through the General Accounting Office, against decisions adverse to the interests of the United States. Certainly the rights of contract[ors] and the Government to review or appeal should be coextensive." *Id.*, at 39.

The associate general counsel of the General Services Administration, J. H. Macomber, Jr., similarly emphasized the need to protect the Government's interests, stating "that there should be some provision in the legislation, if not an explicit provision at least by appropriate wording with respect to the judicial review portion, that will insure an opportunity to protect the Government against excessive generosity, against decisions of the contracting officer adverse to the Government." *Id.*, at 59. Mr. Macomber suggested that

> "there might be some doubt under the wording of H. R. 6946 . . . where specific reference is made to a finding by the court[,] as to whether the General Accounting Office could seek a court review by a setoff or by applying to the Department of Justice for recovery in a case where they felt that the action of the contracting officer was grossly erroneous as against the Government. I think that the language suggested by the Comptroller General's revision gets away from that difficulty." *Ibid.*

Mr. Simmons, a contractor who had supported H. R. 1839 at the initial hearing, appeared again to support GAO's substitute bill on the ground that it "was prepared to meet objections of certain industries against giving the General Accounting Office express statutory authority to review administrative decisions under the disputes

clause, and is designed to give the General Accounting Office no more authority in this connection than it had before the Wunderlich decision." *Id.*, at 76.

Many other witnesses supported GAO's substitute bill on essentially the same grounds. *E. g., id.*, at 52–56, 77–88, 91–95, 101–104, 123–124. Louis F. Dahling, associate counsel for the Automobile Manufacturers Association, asserted that H. R. 1839 would "make the General Accounting Office another Court of Claims" and thus deprive contractors of their day in court.

> "Now, it does not appear from the language in that bill that there would be any appeal from a decision of the General Accounting Office, and that office will in all probability make the first review of any disputes clause decision. If that agency should decide that the decision was not supported by substantial evidence, it would appear that the contractor would have no redress. Furthermore, the General Accounting Office is a part of the legislative department of the Government. . . . If this agency is made another Court of Claims, in a sense it becomes a judge and jury and a prosecutor." *Id.*, at 97.

Mr. Dahling therefore supported GAO's bill because it did "not grant judicial power to the General Accounting Office." *Id.*, at 98. Charles Maechling, Jr., a representative of the Radio-Electronics-Television Manufacturers Association, echoed this view.

> "Under S. 24, however, the scope and powers of the General Accounting Office are vastly enlarged, and this agency of the Government, which has heretofore exercised principally investigatory and audit functions, becomes clothed with powers of a judicial nature. S. 24 appears to set up the General Accounting Office as a third administrative tier of review in Government contract disputes." *Id.*, at 105.

Similarly, the American Merchant Marine Institute submitted a statement objecting to H. R. 1839

> "in so far as it establishes the General Accounting Office as a sort of intermediate or 'floating' court and vests it with express statutory authority to set aside [an administrative] decision merely because its administrative officers in their opinion consider the decision not to be supported by substantial evidence. On the other hand, we fully agree that a decision of a contracting officer or, upon appeal, of the head of the contracting agency, should be subject to judicial review and reversal by the courts . . . . This judicial function, however, should not be shared with or otherwise vested in the General Accounting Office . . . . The literal effect of S. 24 appears to be that once the General Accounting Office may have found the decision to be not supported by substantial evidence, it may not thereafter be pleaded in court either by the contracting party or the Government as limiting the scope of judicial review to that provided for by the disputes clause." *Id.*, at 122.

Opposition to H. R. 1839, then, was premised on the fear that its reference to GAO might deprive contractors of any recourse to the courts. That judicial review was the contractors' sole concern is also clear from the position taken by the Associated General Contractors, *id.*, at 61–75, which supported H. R. 1839 on the ground that it would restore to contractors "the fundamental right of judicial review of disputes arising under Government contracts." *Id.*, at 62.

That deletion of the reference to GAO was not understood as denying judicial review to the Government becomes evident from an examination of Representative Willis' testimony about his bill, H. R. 6946, which was identical to H. R. 1839 except that it omitted the words "the General Accounting Office or." *Id.*, at 31. He tes-

tified that the "Wunderlich decision could react and has reacted unfavorably to the Government where the Government felt it was the aggrieved party." *Id.*, at 32. The following colloquy then occurred:

> "Mr. HYDE. The only question that occurred to me was that you mentioned there might be a time when the Government was the aggrieved party. With the present procedure, the Government is not likely to be the aggrieved party?
>
> "Mr. WILLIS. It could be. It could very well be, because here you are dealing with fraud, and the court says that in order to have relief one must be guilty of fraud. Now, a contracting officer who hands down a decision against the Government can very adversely affect the Government itself, and the Government some of these days might find a decision very much against itself. The decision works both ways, in that there is no appeal either way from the holding of the contracting officer unless a showing of fraud is made, and the Government itself might be caught some of these days under this Wunderlich decision. I know of one case when the court so ruled.
>
> . . . . .
>
> "Mr. HYDE. If the contracting officer makes a finding, under what circumstances would the Government be the one to take an appeal or want to take an appeal? Who would be the one in the Government to say, 'We are going to take an appeal'?
>
> "Mr. WILLIS. I imagine the General Accounting Office would be interested, and the Department of Justice and the Department of Defense. Suppose a dispute arises . . . [a]nd then on matters of fact the contracting officer holds one way. Then neither side has recourse unless there is a showing that the

contracting officer was dishonest, was guilty of fraud, or intended to cheat someone." *Id.*, at 33–34.

This testimony is significant also in light of the later testimony of Franklin M. Schultz, a former law professor who had written about the problems created by the *Wunderlich* decision. Mr. Schultz expressed concern that GAO's substitute bill did "not say specifically that an appeal can be taken by an aggrieved contractor." A committee member then asked whether the language of GAO's bill did "not necessarily include both parties." *Id.*, at 110. The following colloquy ensued:

"Mr. SCHULTZ. Yes, and that is exactly my point. . . . [S]everal years from now, if the Comptroller General decides . . . that a contracting officer's decision is not supported by substantial evidence, he could refuse payment, and in a court action he could say that this bill means that it is a two-way street, not only may the contractor upset the contracting officer for not having substantial evidence behind the decision, but in the case where the contracting officer makes a decision favorable to the contractor the GAO has similar upsetting power. . . .

. . . . . .

"Mr. WILLIS. This judicial review referred to in that passage there referring to a review by GAO, when GAO has been left out deliberately as compared to S. 24?

"Mr. SCHULTZ. Well, that is persuasive, sir, but you do have the testimony of Mr. Fisher, sponsoring [GAO's] bill . . . saying that the rights of contractors and the Government to appeal should be coextensive. . . ." *Id.*, at 110–111.

Mr. Schultz went on to say, what was implicit in the above colloquy, that his objection was not to judicial

review for the Government, which he recognized would be available, but to judicial review for either the Government or contractors on the basis of the "substantial evidence" test. He indicated that his "own preference would be for the language of [GAO's] bill without the phrase 'substantial evidence,'" *id.*, at 113, and in a subsequent letter to the Subcommittee he again suggested that neither the Government nor contractors should be permitted to rely upon that standard to upset an administrative decision, *id.*, at 118–119.

The Subcommittee was presented with, but took no action upon, a bill proposed by the American Bar Association that would have expressly limited the right of judicial review to contractors. *Id.*, at 89. Instead, the Committee reported out the bill that is now the Wunderlich Act. H. R. Rep. No. 1380, 83d Cong., 2d Sess. (1954). The report stated:

> "The purpose of the proposed legislation . . . is to overcome the effect of the Supreme Court decision . . . under which the decisions of Government officers rendered pursuant to the standard disputes clauses in Government contracts are held to be final absent fraud on the part of such Government officers.
>
> ". . . The proposed legislation also prescribes fair and uniform standards for the judicial review of such administrative decisions in the light of the reasonable requirements of the various Government departments and agencies, of the General Accounting Office and of Government contractors." *Id.*, at 1–2.

The report also discussed the effect of the legislation on GAO, in much the same terms as had the prior Senate reports.

> "The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present

jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.

"The elimination of the specific mention of the General Accounting Office from the provisions of the bill as amended should not be construed as taking away any of the jurisdiction of that Office. It is intended that the General Accounting Office, as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of review that are granted to the courts under this bill. At the same time there is no intention of setting up the General Accounting Office as a 'court of claims.' Nor should the elimination of the specific mention of the General Accounting Office in the bill be construed as limiting its review to the fraudulent intent standard prescribed by the Wunderlich decision." *Id.*, at 6–7.

Representative Graham stated on the floor of the House that the Comptroller General had approved the bill, and the House passed it without debate. 100 Cong. Rec. 5510. When the bill came to the Senate, Senator McCarran explained that

"The purpose of the proposed legislation is to overcome the inequitable effect, under the decison of the Supreme Court in the Wunderlich case, of language in Government contracts which makes the decision of the contracting officer or the head of the agency final, with respect to questions of fact. To put it another way, the objective of this bill is to preserve the right of review by the courts in cases

involving action by a contracting officer which is arbitrary, capricious, fraudulent, or so grossly erroneous as necessarily to imply bad faith.

"The language of the House bill, while quite different from the language approved in the Senate, is designed to accomplish the same purpose. It is my understanding the Department of Justice takes the view that the House language will accomplish the same purpose as the Senate language. It is my further understanding that the Comptroller General of the United States has expressed complete satisfaction with the House language, and has declared that in his opinion it will accomplish the purposes sought to be served by the Senate language." *Id.*, at 5717.

After Senator McCarran further assured the Senate that GAO was "satisfied with the language in the House bill" and that "otherwise [he] would not care to go along," *ibid.*, a final colloquy occurred:

"Mr. THYE. As I understand, the bill was passed by the Senate, and a similar bill was passed by the House. The only question involved is a modification of the language in the Senate bill, and the two bills agree in their effect, so to speak?

"Mr. McCARRAN. That is correct.

"Mr. THYE. There is nothing else of a legislative nature involved. Is that correct?

"Mr. McCARRAN. That is correct." *Id.*, at 5718.

The Senate then passed the bill. *Ibid.*

Syllabus

ILLINOIS v. CITY OF MILWAUKEE, WISCONSIN, ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 49, Orig. Argued February 29, 1972—Decided April 24, 1972

The State of Illinois has filed a motion for leave to file a bill of complaint against four Wisconsin cities and two local sewerage commissions for allegedly polluting Lake Michigan. Illinois seeks to invoke the Court's original jurisdiction on the ground that the defendants are instrumentalities of Wisconsin and that this suit is therefore one against the State that must be brought in this Court under Art. III, § 2, cl. 2, of the Constitution which confers original jurisdiction on the Court "[i]n all cases . . . in which a State shall be a party," and 28 U. S. C. § 1251 (a)(1), which provides that the Court shall have "original and exclusive jurisdiction of [all] controversies between two or more States . . . ." Under 28 U. S. C. § 1251 (b)(3) the Court has "original but not exclusive" jurisdiction of actions by a State against citizens of another State, and under § 1331 (a) a district court has original jurisdiction "of all civil actions wherein the matter in controversy exceeds $10,000 . . . and [arises] under the Constitution [or] laws . . . of the United States." *Held:*

1. Though Wisconsin could be joined as a defendant here under appropriate pleadings, it is not mandatory that it be made one, and its political subdivisions are not "States" within the meaning of 28 U. S. C. § 1251 (a)(1). If those subdivisions may be sued by Illinois in a federal district court, this Court's original jurisdiction under § 1251 (b)(3) is merely permissible, not mandatory. Pp. 93–98.

2. In this case the appropriate federal district court has jurisdiction under 28 U. S. C. § 1331 (a) to give relief against the nuisance of interstate water pollution and is the proper forum for litigation of the issues here involved. Pp. 98–101.

(a) The jurisdictional-amount requirement of § 1331 (a) is satisfied in this action involving the purity of interstate waters. P. 98.

(b) Pollution of interstate or navigable waters creates actions under the "laws" of the United States within the meaning of

§ 1331 (a), since the term "laws" embraces claims like the one here involved founded on federal common law as well as those of statutory origin. Pp. 99–100.

(c) Under § 1331 (a) a State may sue a defendant other than another State in a district court. Pp. 100–101.

3. Federal common law applies to air and water in their ambient or interstate aspects. Pp. 101–108.

(a) The application of federal common law to abate the pollution of interstate or navigable waters is not inconsistent with federal enforcement powers under the Water Pollution Control Act. Pp. 101–104.

(b) While federal environmental protection statutes may be sources of federal common law, they will not necessarily form the outer limits of such law. Pp. 103, 107.

(c) State environmental quality standards are relevant but not conclusive sources of federal common law. P. 107.

(d) Federal equity courts have a wide range of powers to grant relief against pollution of this sort. Pp. 107–108.

Motion denied.

DOUGLAS, J., delivered the opinion for a unanimous Court.

Fred F. Herzog argued the cause for plaintiff. With him on the briefs was *William J. Scott*, Attorney General of Illinois.

Harry G. Slater argued the cause for defendants. With him on the brief for defendant City of Milwaukee were *John J. Fleming* and *Richard F. Maruszewski*. *Michael S. Fisher* and *Burton A. Scott* filed a brief for defendant City of Kenosha. *Jack Harvey, Edward A. Krenzke*, and *Louis J. Roshar* filed a brief for defendant City of Racine. *Mr. Fleming* and *Harvey G. Odenbrett* filed a brief for defendant Sewerage Commission of the City of Milwaukee. *Ewald L. Moerke, Jr.*, filed a brief for defendant Metropolitan Sewerage Commission of the County of Milwaukee.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a motion by Illinois to file a bill of complaint under our original jurisdiction against four cities of Wisconsin, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee. The cause of action alleged is pollution by the defendants of Lake Michigan, a body of interstate water. According to plaintiff, some 200 million gallons of raw or inadequately treated sewage and other waste materials are discharged daily into the lake in the Milwaukee area alone. Plaintiff alleges that it and its subdivisions prohibit and prevent such discharges, but that the defendants do not take such actions. Plaintiff asks that we abate this public nuisance.

I

Article III, § 2, cl. 2, of the Constitution provides: "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." Congress has provided in 28 U. S. C. § 1251 that "(a) the Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States."

It has long been this Court's philosophy that "our original jurisdiction should be invoked sparingly." *Utah* v. *United States*, 394 U. S. 89, 95. We construe 28 U. S. C. § 1251 (a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We

incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer. *Washington* v. *General Motors Corp., post,* p. 109.

Illinois presses its request for leave to file saying that the agencies named as defendants are instrumentalities of Wisconsin and therefore that this is a suit against Wisconsin which could not be brought in any other forum.

Under our decisions there is no doubt that the actions of public entities might, under appropriate pleadings, be attributed to a State so as to warrant a joinder of the State as party defendant.

In *Missouri* v. *Illinois,* 180 U. S. 208, Missouri invoked our original jurisdiction by an action against the State of Illinois and the Sanitary District of the City of Chicago, seeking an injunction to restrain the discharge of raw sewage into the Mississippi River. On a demurrer to the motion for leave to file a bill of complaint, Illinois argued that the Sanitary District was the proper defendant and that Illinois should not have been made a party. That argument was rejected:

> "The contention . . . seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a corporation of the State of Illinois, it therefore follows that the State, as such, is not interested in the question, and is improperly made a party.
>
> "We are unable to see the force of this suggestion. The bill does not allege that the Sanitary District is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation is an agency of the State to do the very things which, according to the theory of the complainant's case, will result in the mischief to be ap-

prehended. It is state action and its results that are complained of—thus distinguishing this case from that of *Louisiana* v. *Texas* [176 U. S. 1], where the acts sought to be restrained were alleged to be those of officers or functionaries proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.

"The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and, having such a right, might properly be made a party defendant." 180 U. S., at 242.

In *New York* v. *New Jersey*, 256 U. S. 296, the State of New York brought an original action against the State of New Jersey and the Passaic Valley Sewerage Commissioners, seeking an injunction against the discharge of sewage into Upper New York Bay. The question was whether the actions of the sewage agency could be attributed to New Jersey so as to make that State responsible for them. The Court said:

"Also, for the purpose of showing the responsibility of the State of New Jersey for the proposed action of the defendant, the Passaic Valley Sewerage Commissioners, the bill sets out, with much detail, the acts of the legislature of that State authorizing and directing such action on their part.

> "Of this it is sufficient to say that the averments of the bill, quite undenied, show that the defendant sewerage commissioners constitute such a statutory, corporate agency of the State that their action, actual or intended, must be treated as that of the State itself, and we shall so regard it." 256 U. S., at 302.

The most recent case is *New Jersey* v. *New York*, 345 U. S. 369. The action was originally brought by the State of New Jersey against the City and State of New York for injunctive relief against the diversion of waters from Delaware River tributaries lying within New York State. Pennsylvania was subsequently allowed to intervene. The question presented by this decision was the right of the City of Philadelphia also to intervene in the proceedings as a party plaintiff. The issues raised were broad:

> "All of the present parties to the litigation have formally opposed the motion to intervene on grounds (1) that the intervention would permit a suit against a state by a citizen of another state in contravention of the Eleventh Amendment; (2) that the Commonwealth of Pennsylvania has the exclusive right to represent the interest of Philadelphia as *parens patriae;* and (3) that intervention should be denied, in any event, as a matter of sound discretion." 345 U. S., at 372.

We denied the City of Philadelphia's motion to intervene, saying:

> "The City of Philadelphia represents only a part of the citizens of Pennsylvania who reside in the watershed area of the Delaware River and its tributaries and depend upon those waters. If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an

intramural dispute over the distribution of water within the Commonwealth. . . .

"Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U. S., at 373.

We added:

"The presence of New York City in this litigation is urged as a reason for permitting Philadelphia to intervene. But the argument misconstrues New York City's position in the case. New York City was not admitted into this litigation as a matter of discretion at her request. She was forcibly joined as a defendant to the original action since she was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey. Because of this position as a defendant, subordinate to the parent state as the primary defendant, New York City's position in the case raises no problems under the Eleventh Amendment." 345 U. S., at 374–375.

We conclude that while, under appropriate pleadings, Wisconsin could be joined as a defendant in the present controversy, it is not mandatory that it be made one.

It is well settled that for the purposes of diversity of citizenship, political subdivisions are citizens of their respective States.[1] *Bullard* v. *City of Cisco*, 290 U. S. 179;

[1] It is equally well settled that a suit between a State and a citizen of another State is not a suit between citizens of different States for the purposes of diversity of citizenship jurisdiction. *Postal Telegraph Cable Co.* v. *Alabama*, 155 U. S. 482, 487.

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Cowles v. *Mercer County*, 7 Wall. 118, 122. If a political subdivision is a citizen for diversity purposes, then it would make no jurisdictional difference whether it was the plaintiff or defendant in such an action. That being the case, a political subdivision in one State would be able to bring an action founded upon diversity jurisdiction against a political subdivision of another State.

We therefore conclude that the term "States" as used in 28 U. S. C. § 1251 (a)(1) should not be read to include their political subdivisions. That, of course, does not mean that political subdivisions of a State may not be sued under the head of our original jurisdiction, for 28 U. S. C. § 1251 provides that "(b) the Supreme Court shall have original but not exclusive jurisdiction of: (3) all actions or proceedings by a State against the citizens of another State . . . ."

If the named public entities of Wisconsin may, however, be sued by Illinois in a federal district court, our original jurisdiction is not mandatory.

It is to that aspect of the case that we now turn.

II

Title 28 U. S. C. § 1331 (a) provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

The considerable interests involved in the purity of interstate waters would seem to put beyond question the jurisdictional amount provided in § 1331 (a). See *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U. S. 121; *Mississippi & Missouri R. Co.* v. *Ward*, 2 Black 485, 492; *Ronzio* v. *Denver & R. G. W. R. Co.*, 116 F. 2d 604, 606; C. Wright, The Law of Federal Courts 117–119 (2d ed. 1970); Note, 73 Harv. L. Rev. 1369.

The question is whether pollution of interstate or navigable waters creates actions arising under the "laws" of the United States within the meaning of § 1331(a). We hold that it does; and we also hold that § 1331 (a) includes suits brought by a State.

MR. JUSTICE BRENNAN, speaking for the four members of this Court in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 393 (dissenting and concurring), who reached the issue, concluded that "laws," within the meaning of § 1331 (a), embraced claims founded on federal common law:

> "The contention cannot be accepted that since petitioner's rights are judicially defined, they are not created by 'the laws . . . of the United States' within the meaning of § 1331 . . . . In another context, that of state law, this Court has recognized that the statutory word 'laws' includes court decisions. The converse situation is presented here in that federal courts have an extensive responsibility of fashioning rules of substantive law . . . . These rules are as fully 'laws' of the United States as if they had been enacted by Congress." (Citations omitted.)

Lower courts have reached the same conclusion. See, *e. g.*, *Murphy* v. *Colonial Federal Savings & Loan Assn.*, 388 F. 2d 609, 611–612 (CA2 1967); *Stokes* v. *Adair*, 265 F. 2d 662 (CA4 1959); *Mater* v. *Holley*, 200 F. 2d 123 (CA5 1952); American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 180–182 (1969).

Judge Harvey M. Johnsen in *Texas* v. *Pankey*, 441 F. 2d 236, 240, stated the controlling principle:

> "As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable fed-

> eral statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own territory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States."

Chief Judge Lumbard, speaking for the panel in *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 391 F. 2d 486, 492, expressed the same view as follows:

> "We believe that a cause of action similarly 'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law . . . . The word 'laws' in § 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation. The rationale of the 1875 grant of federal question jurisdiction—to insure the availability of a forum designed to minimize the danger of hostility toward, and specially suited to the vindication of, federally created rights—is as applicable to judicially created rights as to rights created by statute." (Citations omitted.)

We see no reason not to give "laws" its natural meaning, see *Romero* v. *International Terminal Operating Co.*, *supra*, at 393 n. 5 (BRENNAN, J., dissenting and concurring), and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.

As respects the power of a State to bring an action under § 1331 (a), *Ames* v. *Kansas*, 111 U. S. 449, 470–472, is controlling. There Kansas had sued a number of corporations in its own courts and, since federal rights were involved, the defendants had the cases removed to the federal court. Kansas resisted, saying that the federal court lacked jurisdiction because of Art. III,

§ 2, cl. 2, of the Constitution, which gives this Court "original Jurisdiction" in "all Cases . . . in which a State shall be Party." The Court held that where a State is suing parties who are not other States, the original jurisdiction of this Court is not exclusive (*id.*, at 470) and that those suits "may now be brought in or removed to the Circuit Courts [now the District Courts] without regard to the character of the parties." [2] *Ibid.* We adhere to that ruling.

III

Congress has enacted numerous laws touching interstate waters. In 1899 it established some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage, Rivers and Harbors Act of March 3, 1899, 30 Stat. 1121, a grant of power which we construed in *United States* v. *Republic Steel Corp.*, 362 U. S. 482, and in *United States* v. *Standard Oil Co.*, 384 U. S. 224.

The 1899 Act has been reinforced and broadened by a complex of laws recently enacted. The Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U. S. C. § 1151, tightens control over discharges into navigable waters so as not to lower applicable water quality standards. By the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, Congress "authorizes and directs" that "the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" and that "all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values

[2] See also H. R. Rep. No. 308, 80th Cong., 1st Sess., A 104 (1947): "The original jurisdiction conferred on the Supreme Court by Article 3, section 2, of the Constitution is not exclusive by virtue of that provision alone. Congress may provide for or deny exclusiveness."

may be given appropriate consideration in decisionmaking along with economic and technical considerations." Sec. 102, 42 U. S. C. § 4332. Congress has evinced increasing concern with the quality of the aquatic environment as it affects the conservation and safeguarding of fish and wildlife resources. See, *e. g.*, Fish and Wildlife Act of 1956, 70 Stat. 1119, 16 U. S. C. § 742a; the Act of Sept. 22, 1959, 73 Stat. 642, authorizing research in migratory marine game fish, 16 U. S. C. § 760e; and the Fish and Wildlife Coordination Act, 48 Stat. 401, as amended, 16 U. S. C. § 661.

Buttressed by these new and expanding policies, the Corps of Engineers has issued new Rules and Regulations governing permits for discharges or deposits into navigable waters. 36 Fed. Reg. 6564 *et seq.*

The Federal Water Pollution Control Act in § 1 (b) declares that it is federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution." But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.[3] While the States are given time to establish water quality standards, § 10 (c)(1), if a State fails to do so the federal administrator[4] promulgates one. § 10 (c)(2). Section 10 (a) makes pollution of interstate or navigable waters subject "to abatement" when it "endangers the health or welfare of any persons."

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[3] The contrary indication in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 498 n. 3, was based on the preoccupation of that litigation with public nuisance under Ohio law, not the federal common law which we now hold is ample basis for federal jurisdiction under 28 U. S. C. § 1331 (a).

[4] The powers granted the Secretary of the Interior under the Federal Water Quality Act of 1965, 79 Stat. 903, were assigned by the President to the Administrator of the Environmental Protection Agency pursuant to Reorganization Plan No. 3 of 1970. See 35 Fed. Reg. 15623.

The abatement that is authorized follows a long-drawn-out procedure unnecessary to relate here. It uses the conference procedure, hoping for amicable settlements. But if none is reached, the federal administrator may request the Attorney General to bring suit on behalf of the United States for abatement of the pollution. § 10 (g).

The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law,[5] as *Texas* v. *Pankey,* 441 F. 2d 236, recently held.

[5] While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision. What we said in another connection in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 456–457, is relevent here:

"The question then is, what is the substantive law to be applied in suits under § 301 (a)? We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." (Citations omitted.) See also Woods & Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case, 12 Ariz. L. Rev. 691, 713–714; Note, 56 Va. L. Rev. 458.

The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act. Congress provided in § 10 (b) of that Act that, save as a court may decree otherwise in an enforcement action, "[s]tate and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not . . . be displaced by Federal enforcement action."

The leading air case is *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, where Georgia filed an original suit in this Court against a Tennessee company whose noxious gases were causing a wholesale destruction of forests, orchards, and crops in Georgia. The Court said:

> "The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in *Missouri* v. *Illinois*, 200 U. S. 496, 520, 521. But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 U. S. 208, 241." 206 U. S., at 237.

The nature of the nuisance was described as follows:

> "It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that

> the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law." *Id.*, at 238.

Our decisions concerning interstate waters contain the same theme. Rights in interstate streams, like questions of boundaries, "have been recognized as presenting federal questions." [6] *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110. The question of apportionment of interstate waters is a question of "federal common law" upon which state statutes or decisions are not conclusive.[7] *Ibid.*

In speaking of the problem of apportioning the waters of an interstate stream, the Court said in *Kansas* v. *Colorado*, 206 U. S. 46, 98, that "through these successive disputes and decisions this court is practically building up what may not improperly be called interstate com-

[6] Thus, it is not only the character of the parties that requires us to apply federal law. See *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237; cf. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 289; The Federalist No. 80 (A. Hamilton). As Mr. Justice Harlan indicated for the Court in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 421–427, where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law. See also *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; C. Wright, The Law of Federal Courts 249 (2d ed. 1970); Woods & Reed, *supra*, n. 5, at 703–713; Note, 50 Texas L. Rev. 183. Certainly these same demands for applying federal law are present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States.

[7] Those who maintain that state law governs overlook the fact that the *Hinderlider* case was written by Mr. Justice Brandeis who also wrote for the Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the two cases being decided the same day.

mon law." And see *Texas* v. *New Jersey*, 379 U. S. 674 (escheat of intangible personal property), *Texas* v. *Florida*, 306 U. S. 398, 405 (suit by bill in the nature of interpleader to determine the true domicile of a decedent as the basis of death taxes).

Equitable apportionment of the waters of an interstate stream has often been made under the head of our original jurisdiction. *Nebraska* v. *Wyoming*, 325 U. S. 589; *Kansas* v. *Colorado*, *supra*; cf. *Arizona* v. *California*, 373 U. S. 546, 562. The applicable federal common law depends on the facts peculiar to the particular case.

> "Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made." 325 U. S., at 618.

When it comes to water pollution this Court has spoken in terms of "a public nuisance," [8] *New York* v. *New Jer-*

[8] In *North Dakota* v. *Minnesota*, 263 U. S. 365, 374, the Court said:

"[W]here one State, by a change in its method of draining water from lands within its border, increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another State, the latter State has such an interest as quasi-sovereign in the comfort, health and prosperity of its farm owners that resort may be had to this Court for relief. It is the creation of a public nuisance of simple type for which a State may properly ask an injunction."

sey, 256 U. S., at 313; *New Jersey* v. *New York City*, 283 U. S. 473, 481, 482. In *Missouri* v. *Illinois*, 200 U. S. 496, 520–521, the Court said, "It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court."

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. While federal law governs,[9] consideration of state standards may be relevant. Cf. *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670; *Kansas* v. *Colorado*, 185 U. S. 125, 146–147. Thus, a State with high water-quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor. There are no fixed rules that govern; these

[9] "Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights. And the logic and practicality of regarding such claims as being entitled to be asserted within the federal-question jurisdiction of § 1331 (a) would seem to be self-evident." *Texas* v. *Pankey*, 441 F. 2d 236, 241–242.

will be equity suits in which the informed judgment of the chancellor will largely govern.

We deny, without prejudice, the motion for leave to file. While this original suit normally might be the appropriate vehicle for resolving this controversy, we exercise our discretion to remit the parties to an appropriate district court [10] whose powers are adequate to resolve the issues.

So ordered.

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[10] The rule of decision being federal, the "action . . . may be brought only in the judicial district where all defendants reside, or in which the claim arose," 28 U. S. C. § 1391 (b), thereby giving flexibility to the choice of venue. See also 28 U. S. C. § 1407.

Whatever may be a municipality's sovereign immunity in actions for damages, see Van Alstyne, Governmental Tort Liability: A Decade of Change, 1966 U. Ill. L. F. 919, 944–948; Note, 4 Suffolk L. Rev. 832 (1970), actions seeking injunctive relief stand on a different footing. The cases are virtually unanimous in holding that municipalities are subject to injunctions to abate nuisances. See cases collected in 17 E. McQuillin, The Law of Municipal Corporations § 49.51 *et seq.* (3d rev. ed. 1968). See also Wis. Stat. Ann. § 59.96 (6)(b) (1957) as respects the suability of metropolitan sewerage commissions.

While the kind of equitable relief to be accorded lies in the discretion of the chancellor (*Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U. S. 334), a State that causes a public nuisance is suable in this Court and any of its public entities is suable in a federal district court having jurisdiction:

"[I]t is generally held that a municipality, like a private individual, may be enjoined from maintaining a nuisance. Thus in a proper case a municipal corporation will be restrained by injunction from creating a nuisance on private property, as by the discharge of sewage or poisonous gases thereon, or, in some jurisdictions, by the obstruction of drainage of waters, or by discharging sewage or filth into a stream and polluting the water to the damage of lower riparian owners, or by dumping garbage or refuse, or by other acts. Likewise, a municipality may be enjoined from creating or operating a nuisance, whether the municipality is acting in a governmental or proprietary capacity, impairing property rights. And, if a nuisance is established causing irreparable injury for which there is no adequate remedy at law it may be enjoined irrespective of the resulting damage or injury to the municipality." 17 McQuillin, *supra*, § 49.55.

Syllabus

WASHINGTON ET AL. *v.* GENERAL MOTORS CORP. ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 45, Orig. Argued February 28–29, 1972—
Decided April 24, 1972

Eighteen States have filed a motion for leave to file a bill of complaint against the Nation's four major automobile manufacturers and their trade association, alleging a conspiracy in violation of the federal antitrust laws, a common-law conspiracy in restraint of trade to restrain the development of motor vehicle air pollution control equipment, and a public nuisance in violation of state and federal common law. Those States seek an injunction, *inter alia*, requiring the defendants to accelerate a research and development program to produce effective pollution control devices and pollution-free engines and to install anti-pollution equipment in all vehicles they manufactured during the alleged conspiracy. *Held:* Though the Court has original but not exclusive jurisdiction, it exercises discretion to avoid impairing its ability to administer its appellate docket. In view of the nature of the relief requested and the availability of the federal district courts as an alternative forum, the Court declines to assume jurisdiction. As a matter of law as well as of practical necessity, remedies for air pollution must be considered in the context of local situations, making it advisable that this controversy be resolved in the appropriate federal district courts. Pp. 113–116.

Motions of North Dakota and West Virginia to be joined as parties plaintiff granted. Motion for leave to file bill of complaint denied and parties remitted to other federal forum.

DOUGLAS, J., delivered the opinion of the Court, in which all Members joined except POWELL, J., who took no part in the consideration or decision of the case.

Fredric C. Tausend, Special Assistant Attorney General of Washington, argued the cause for plaintiffs. With him on the briefs were *Slade Gorton*, Attorney General of Washington, *William L. Dwyer* and *David G. Knibb*, Special Assistant Attorneys General; *William J. Scott*, Attorney General of Illinois, and *Robert S. Atkins* and *David C. Landgraf*, Assistant Attorneys Gen-

eral; *Gary Nelson*, Attorney General of Arizona, and *Malcolm P. Strohson*, Assistant Attorney General; *Duke W. Dunbar*, Attorney General of Colorado, *John Moore*, Deputy Attorney General, and *William Tucker*, Assistant Attorney General; *Bertram T. Kanbara*, Attorney General of Hawaii, and *George Pai*, Deputy Attorney General; *W. Anthony Park*, Attorney General of Idaho, and *Richard Greener*, Deputy Attorney General; *Richard C. Turner*, Attorney General of Iowa; *Kent Frizzell*, Attorney General of Kansas, and *Richard Hayse*, Assistant Attorney General; *James S. Erwin*, Attorney General of Maine; *Robert H. Quinn*, Attorney General of Massachusetts, and *Neal Colicchio*, Assistant Attorney General; *Douglas M. Head*, Attorney General of Minnesota; *John C. Danforth*, Attorney General of Missouri; *Helgi Johanneson*, Attorney General of North Dakota, and *Paul M. Sand*, First Assistant Attorney General; *Paul W. Brown*, Attorney General of Ohio, and *Donald Weckstein*, Assistant Attorney General; *Herbert F. DeSimone*, Attorney General of Rhode Island; *James M. Jeffords*, Attorney General of Vermont, and *John D. Hansen*, Assistant Attorney General; *Andrew P. Miller*, Attorney General of Virginia, and *Anthony F. Troy*, Assistant Attorney General; *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, *Gene Hal Williams*, First Deputy Attorney General, and *James G. Anderson III*, Assistant Attorney General.

Lloyd N. Cutler argued the cause for defendants. With him on the briefs were *Howard P. Willens, Jay F. Lapin, Louis F. Oberdorfer, James S. Campbell, Julian O. Von Kalinowski*, and *Paul G. Bower* for Automobile Manufacturers Assn., Inc.; *Walter J. Williams* and *Forrest A. Hainline, Jr.*, for American Motors Corp.; *Tom Killefer, William E. Huth, G. William Shea*, and *Philip K. Verleger* for Chrysler Corp.; *Robert L. Stern* and *Carl J. Schuck* for Ford Motor Co.; *Ross L. Malone, Robert A. Nitschke, Hammond E. Chaffetz, Joseph Du-*

Coeur, Marcus Mattson, and *Richard F. Outcault, Jr.,* for General Motors Corp.

Brief for Alabama et al. as *amici curiae* in support of plaintiffs' motion for leave to file bill of complaint was filed by *J. Lee Rankin, David I. Shapiro,* and *Jerome S. Wagshal,* and by the following Attorneys General for their respective States: *William J. Baxley* of Alabama, *John E. Havelock* of Alaska, *Evelle J. Younger* of California, *Robert L. Shevin* of Florida, *Jack P. F. Gremillion* of Louisiana, *Francis B. Burch* of Maryland, *A. F. Summer* of Mississippi, *Robert List* of Nevada, *David L. Norvell* of New Mexico, *Louis J. Lefkowitz* of New York, *Larry Derryberry* of Oklahoma, *J. Shane Creamer* of Pennsylvania, *Daniel R. McLeod* of South Carolina, *Gordon Mydland* of South Dakota, *Crawford C. Martin* of Texas, and *Robert W. Warren* of Wisconsin.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Plaintiffs are 18 States who, by this motion for leave to file a bill of complaint, seek to invoke this Court's original jurisdiction under Art. III, § 2, cl. 2, of the Constitution.[1] Named as defendants are the Nation's four major automobile manufacturers and their trade association.

Plaintiffs allege a conspiracy among the defendants to restrain the development of motor vehicle air pollution control equipment. They allege that the conspiracy began as early as 1953 but was concealed until January 1969. Count I of the proposed complaint charges a violation of the federal antitrust laws. Count II charges a common-law conspiracy in restraint of

[1] Fifteen States originally moved for leave to file a bill of complaint. We subsequently granted leave to the State of Idaho to intervene as plaintiff. 403 U. S. 949. By today's decision we also grant leave to the States of North Dakota and West Virginia to be joined as parties plaintiff.

trade independently of the Sherman and Clayton Acts.[2] In their prayer for relief, plaintiffs seek an injunction requiring the defendants to undertake "an accelerated program of spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date" and also ordering defendants to install effective pollution control devices in all motor vehicles they manufactured during the conspiracy and as standard equipment in all future motor vehicles which they manufacture. Other prophylactic relief is also sought.

The proposed complaint plainly presents important questions of vital national importance. See, *e. g.*, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 90th Cong., 1st Sess. (1967). Our jurisdiction over the controversy cannot be disputed. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. For reasons which will appear, however, we deny leave to file the bill of complaint.

The gravamen of plaintiffs' allegations is a horizontal conspiracy among the major automobile manufacturers to impede the research and development of automotive air pollution control devices. See generally L. Jaffe & L. Tribe, Environmental Protection 141–180 (1971). It

[2] A third count of plaintiffs' proposed complaint also charged "a public nuisance contrary to the public policy of the Plaintiff States . . . [and] the federal government." Motion for Leave to File Bill of Complaint 12. In a memorandum filed with this Court Feb. 19, 1972, however, plaintiffs struck this count from their proposed complaint; but Idaho, the intervenor, did not join in that motion. In light of our disposition of Counts I and II of the bill of complaint, Idaho's motion for leave to file a bill of complaint solely for Count III should be denied *a fortiori*. Should any of the plaintiffs desire to renew the public nuisance count of the bill of complaint in the District Court, they are free to do so under our decision today in *Illinois* v. *City of Milwaukee*, *ante*, p. 91.

is argued that the facts alleged in support of the statutory and common-law claims are identical and that they could be elicited as well by a Special Master appointed by this Court as by a federal district court judge, and that resort to a Special Master would not place a burden on this Court's time and resources substantially greater than when we hear an antitrust case on direct appeal from a district court under the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. And it is argued that the sheer number of States that seek to invoke our original jurisdiction in this motion is reason enough for us to grant leave to file.[3]

The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired. *Massachusetts* v. *Missouri*, 308 U. S. 1, 19; *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 497–499; H. Hart & H. Wechsler, The Federal Courts and the Federal System 258–260 (1953); Woods & Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case, 12 Ariz. L. Rev. 691; Note, 11 Stan. L. Rev. 665, 694–700. In *Massachusetts* v. *Missouri*, *supra*, at 18–19, where Massachusetts sought to invoke our original jurisdiction in order to collect a tax claim, we said:

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection. . . . To open this Court to

[3] In addition to the 18 States which are plaintiffs, 16 other States and the City of New York have filed a brief as *amicus curiae* supporting plaintiffs' motion for leave to file a bill of complaint.

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> actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it."

By the same token, we conclude that the availability of the federal district court as an alternative forum and the nature of the relief requested suggest we remit the parties to the resolution of their controversies in the customary forum. The nature of the remedy which may be necessary, if a case for relief is made out, also argues against taking original jurisdiction.

Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." 81 Stat. 485, 42 U. S. C. § 1857 (a)(3). To be sure, Congress has largely pre-empted the field with regard to "emissions from new motor vehicles," 42 U. S. C. § 1857f–6a (a); 31 Fed. Reg. 5170 (1966); and motor vehicle fuels and fuel additives, 84 Stat. 1699, 42 U. S. C. § 1857f–6c (c)(4). See Currie, Motor Vehicle Air Pollution: State Authority and Federal Pre-emption, 68 Mich. L. Rev. 1083 (1970); Hill, The Politics of Air Pollution: Public Interest and Pressure Groups, 10 Ariz. L. Rev. 37, 44–45 (1968); Stevens, Air Pollution and the Federal System: Responses to Felt Necessities, 22 Hastings L. J. 661, 674–676 (1971). It has also pre-empted the field so far as emissions from airplanes are concerned, 42 U. S. C.

§§ 1857f–9 to 1857f–12. So far as factories, incinerators, and other stationary devices are implicated, the States have broad control to an extent not necessary to relate here.[4] See Stevens, *supra, passim;* Comment, 58 Calif. L. Rev. 1474 (1970). But in certain instances, as, for example, where federal primary and secondary ambient air quality standards have been established,[5] 42 U. S. C. §§ 1857c–4 and 1857c–5, or where "hazardous air pollutant[s]" have been defined, 42 U. S. C. § 1857c–7, there may be federal pre-emption. See 42 U. S. C. § 1857c–8 *et seq.* Moreover, geophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution. See Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 90th Cong., 1st Sess., 130 (1967); Coons, Air Pollution & Government Structure, 10 Ariz. L. Rev.

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[4] Because federal motor vehicle emission control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles. Moreover, citizens, States, and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights. 42 U. S. C. § 1857h–2.

[5] National primary ambient air quality standards are those "which in the judgment of the Administrator [of the Environmental Protection Agency] . . . are requisite to protect the public health . . . ." 42 U. S. C. § 1857c–4 (b)(1). Secondary ambient air quality standards are those "requisite to protect the public welfare," 42 U. S. C. § 1857c–4 (b)(2), which "includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U. S. C. § 1857h (h). For implementation plans for primary and secondary ambient air quality standards, see 42 U. S. C. § 1857c–5.

Rules and regulations setting ambient air quality standards have been promulgated by the Environmental Protection Agency. 36 Fed. Reg. 22384 (1971).

48, 60–64 (1968). Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates.

As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations.[6] We conclude that the causes should be heard in the appropriate federal district courts.[7]

The motions of the States of North Dakota and West Virginia to be joined as parties plaintiff are granted. The motion for leave to file a bill of complaint is denied and the parties are remitted without prejudice to the other federal forum.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

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[6] It was in recognition of this fact that Congress directed the Administrator of the Environmental Protection Agency to "designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards." 42 U. S. C. § 1857c–2 (c).

[7] Multi-district litigation apparently involving the same factual claims as are presented here has been consolidated in the District Court for the Central District of California and pretrial proceedings are already under way. See *In re Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. 1349 (Jud. Panel on Multidist. Lit. 1970).

NEBRASKA *v.* IOWA

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 17, Orig. Argued March 29, 1972—Decided April 24, 1972

The exceptions to the Special Master's Report in this action brought by Nebraska for construction and enforcement of the Iowa-Nebraska Boundary Compact of 1943, entered into to establish a permanent location of a boundary line made difficult by the meanderings of the Missouri River, are generally overruled. Iowa's exception to the Master's recommendation for an injunction enjoining Iowa from further prosecution of certain pending cases is sustained, as the Court is confident Iowa will abide by the adoption of the Master's conclusion that in any proceeding between a private litigant and the State in which a claim of title good under Nebraska law to land allegedly ceded to Iowa under the Compact is proved, Iowa shall not invoke its common-law doctrine of state ownership as defeating such title. The States may submit a proposed decree in accordance with this opinion, and, if they cannot agree, the Master will prepare and submit a recommended decree. Pp. 117–127.

BRENNAN, J., delivered the opinion for a unanimous Court.

Howard H. Moldenhauer, Special Assistant Attorney General of Nebraska, argued the cause for plaintiff. With him on the briefs were *Clarence A. H. Meyer,* Attorney General, and *Joseph R. Moore,* Special Assistant Attorney General.

Michael Murray, Special Assistant Attorney General of Iowa, argued the cause for defendant. With him on the briefs were *Richard C. Turner,* Attorney General, and *Manning Walker,* Special Assistant Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Both Iowa and Nebraska filed Exceptions to the Report submitted by the Special Master in this original action brought by Nebraska against Iowa for construction

and enforcement of the Iowa-Nebraska Boundary Compact of 1943.[1]

The Missouri River is the boundary between the two States. In 1892, in another suit brought by Nebraska against Iowa, this Court held that the boundary line in the river at Carter Lake, Iowa, was to be located according to the principle that the boundary "is a varying line" so far as affected by "changes of diminution and accretion in the mere washing of the waters of the stream," but not where the river is shifted by avulsion: "By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel; . . . unless the waters of the river returned to their former bed, [such center line] became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel." *Nebraska* v. *Iowa*, 143 U. S. 359, 370 (1892); the decree is in 145 U. S. 519 (1892). The Compact adopts this line at Carter Lake, and for the rest of the boundary fixes the line in "the middle of the main channel of the Missouri river," defined as the "center line of the proposed stabilized channel of the Missouri river as estab-

[1] Iowa Code 1971, p. lxiv; Iowa Acts 1943, c. 306; Nebraska Laws 1943, c. 130; Act of July 12, 1943, 57 Stat. 494.

Leave to file the action was granted in 1965. 379 U. S. 876 (1964); 379 U. S. 996 (1965). There have been successive Special Masters. See 380 U. S. 968 (1965); 392 U. S. 918 (1968); 393 U. S. 910 (1968). Senior Judge Joseph P. Willson completed the case after extensive hearings and filed his Report on November 9, 1971. 404 U. S. 933 (1971). The Exceptions of the States were orally argued before this Court on March 29, 1972.

Iowa's Exception I renews the objection to the Court's jurisdiction that was overruled when leave to file was granted. We overrule the Exception. "Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts." *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 28 (1951); Const. Art. III, § 2; 28 U. S. C. § 1251.

lished by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri river from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP–1 to 4 inclusive, dated January 30, 1940, and file numbers AP–5 to 10 inclusive, dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the secretary of state of the State of Iowa and with the secretary of state of the State of Nebraska." The "proposed stabilized channel" refers to a project begun in the early 1930's by the United States Army Corps of Engineers to tame the river along its entire length by containing it within a designed channel. The work had been partially completed by 1943, but was suspended when World War II intervened. When work resumed in 1948, the channel was partly redesigned, and by 1959 the river had been confined in the newly designed channel.

The States determined in 1943 to agree by compact upon a permanent location of the boundary line when experience showed that "the fickle Missouri River . . . refused to be bound by the Supreme Court decree [of 1892]. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'that of avulsion.'" Eriksson, Boundaries of Iowa, 25 Iowa J. of Hist. and Pol. 163, 234 (1927). The Special Master found, on ample evidence, and we adopt his findings, that by 1943 the shifts of the river channel had been so numerous and intricate, both in its natural state and as a result of the work of the Corps of Engineers, that it would be practically impossible to locate the original boundary line.[2]

[2] Report 63, 65, 67, 68, 80.

The fixing of the permanent boundary by Compact resulted in some riparian lands formerly in each State being located within the other State. This created the problem of the effect to be given by the new State to titles, mortgages, and other liens that had arisen under the laws of the other State. Sections 2 and 3 of the Compact were designed to solve this problem.[3] Under § 2 each State "cedes" to the other State "and relinquishes jurisdiction over" all such lands now located within the Compact boundary of the other. Under § 3, "[t]itles, mortgages, and other liens" affecting such lands "good in" the ceding State "shall be good in" the other State.

The instant dispute between the States arose when Iowa in 1963 claimed state ownership of some 30 separate areas of land, water, marsh, or mixture of the three wholly on the Iowa side of the Compact boundary. The eighth and part of a ninth such areas were formed before 1943. The 21st and part of a 22d were formed after 1943.[4] Iowa's claim was based on Iowa common

[3] Each State Legislature adopted a statute to evidence its agreement to the Compact. Sections 2 and 3 of each statute create obligations reciprocated by the other State in §§ 2 and 3 of its statute. In the Iowa statute the sections are:

"SEC. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

"SEC. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

[4] The areas formed before 1943 are Nottleman Island, Schemmel Island, St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, Wilson Island, Deer Island, and a portion of Winnebago Bend. Report 106, 165.

The areas formed since 1943 are Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend,

law that private titles to riparian lands run only to the ordinary high-water mark on navigable streams and that the State is the owner of the beds of all navigable streams within the State and is also the owner of any islands that may form therein. *McManus* v. *Carmichael,* 3 Iowa 1 (1856); *Holman* v. *Hodges,* 112 Iowa 714, 84 N. W. 950 (1901). The areas formed before 1943 lie south of Omaha and those formed after 1943 lie north of Omaha. Two of the pre-1943 areas are Nottleman Island and Schemmel Island. Each is the subject of an action to quiet title brought by Iowa in Iowa courts.[5] The defense in each case is that there exist "titles . . . good in Nebraska" to the islands that, under § 3 of the Compact, Iowa obligated itself to recognize to be "good in Iowa" as against any claim of Iowa under its doctrine of state ownership.

Thus, the controversy between the States in this case centers around the proper construction of their Compact. The Special Master's Findings and Conclusions generally favor Nebraska's position on the merits of the controversy over the areas that formed before July 12, 1943, and Iowa's exceptions are addressed to them. On the other hand, the Findings and Conclusions favor Iowa's position on the merits of the controversy over the areas that formed after July 12, 1943, and Nebraska's exceptions are primarily addressed to them. We overrule all excep-

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Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Little Sioux Bend, Bullard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, and California Bend. *Id.,* at 107.

[5] On March 18, 1963, Iowa filed, in the District Court for Mills County, *State of Iowa* v. *Darwin Merrit Babbit et al.,* Equity No. 17433 to quiet title to Nottleman Island. On March 26, 1963, Iowa filed, in the District Court of Fremont County, *State of Iowa* v. *Henry E. Schemmel et al.,* Equity No. 19765 to quiet title to Schemmel Island. Proceedings in the actions have been suspended pending our decision.

tions, save two, of Nebraska's addressed to printing errors in the Report,[6] except as we sustain, *infra*, Iowa's Exceptions IV and V insofar as the Special Master recommended that an injunction issue, and except as mentioned in n. 8, *infra*.

The Special Master construed the word "cedes" in § 2 as meant by the States to describe all areas formed before July 12, 1943, regardless of their location with reference to the original boundary, whose "[t]itles, mortgages, and other liens" were, at the date of the Compact, "good in" the ceding State, and ruled that, under § 3, the other State is bound to recognize such "[t]itles, mortgages, and other liens" to be "good in" its State, and not to claim ownership in itself. Iowa urges, in its Exceptions II and III, that this construction is erroneous and that §§ 2 and 3 should be construed as relating only to areas formed before July 12, 1943, that can be proved by clear, satisfactory, and convincing evidence to have been on the Nebraska side of the *original* boundary before the Compact fixed the permanent boundary. We overrule Iowa's Exceptions. Iowa's construction would require the claimant who proves title "good in Nebraska" also to shoulder the burden of proving the location of the *original* boundary before 1943, as well as proving that the lands were on the Nebraska side of that boundary. That, said the Special Master, and we agree, "would be placing a burden upon the land owner which the states themselves refused to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owners, 'we could not prove where the boundary was in 1943 but now, after we have waited 27

[6] Exceptions of the State of Nebraska, No. 6, p. 8, and No. 12, p. 11. Iowa concedes that the Exceptions are well taken. Iowa Reply 5, 7. The errors will be deemed corrected as suggested by the Exceptions.

years, we are going to make you prove where it was at your expense even though we know it is impossible.' " [7]

Iowa's Exceptions IV and V concern the Special Master's findings that the State of Iowa does not own Nottleman Island and Schemmel Island. The Special Master found that the proofs sufficed to establish title "good in Nebraska" to Nottleman Island and Schemmel Island, but did not suffice to prove title "good in Nebraska" to the other areas claimed by Iowa that were formed before 1943.[8] He found, and we agree, that titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from Iowa law, run to the thread of the contiguous stream. *Kinkead* v. *Turgeon*, 74 Neb. 573, 104 N. W. 1061 (1905), 74 Neb. 580, 109 N. W. 744 (1906).[9] He found further that titles "good in Nebraska" embrace titles obtained by 10 years' open, notorious, and adverse possession under claim of right without any requirement of a record title; under Iowa law, a claim must be under

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[7] Report 88–89.

[8] *Id.*, at 174. The Special Master found, alternatively, that if his construction of §§ 2 and 3 was not accepted, nevertheless the landowners met the burden of proving that Nottleman and Schemmel Islands were actually on the Nebraska side of the original boundary. Since we agree with the Special Master's construction, we consider no Exceptions addressed to those findings.

[9] In Iowa's Reply, filed January 19, 1972, Iowa for the first time in this protracted litigation retracts its concession, made often and throughout the proceedings, that *Kinkead* established this principle of Nebraska law. In its Reply, at 15–16, Iowa contends that "the common law of the State of Nebraska did not in fact give the Nebraska riparian owners along the Missouri River title or ownership of the bed of the navigable channel of the river, and they acquired no property right to such bed until it was abandoned by the river." Our reading of the Nebraska cases satisfies us that the argument is frivolous.

"color of title," requiring some type of record title to commence the period of adverse possession.[10]

The Special Master recommended that as to areas formed before July 12, 1943, §§ 2 and 3 should be construed as limiting the State of Iowa to contesting with private litigants in state or federal courts the question whether the private claimants can prove title "good in Nebraska," and when private litigants prove such title, as obliging Iowa not to interpose Iowa's doctrine of state ownership as defeating such title.[11] We agree, and to that extent overrule Iowa's Exceptions IV and V. As to Nottleman Island and Schemmel Island, however, the Special Master recommended that, in addition to a judgment that titles "good in Nebraska" have been proved as to those islands, so that Iowa is precluded from claiming title thereto under its doctrine of state ownership, this Court should enjoin the State of Iowa, its officers, agents, and servants from further prosecution of the cases now pending in the Iowa courts.[12] We see no reason for an injunction at this stage. We are confident that the State of Iowa will abide by our adoption of the Special Master's conclusion that in any proceeding between a private litigant and the State of Iowa in which a claim of title good under the law of Nebraska is proved, the State of Iowa will not invoke its common-law doctrine of state ownership as defeating such title. Iowa's Exceptions IV and V are therefore sustained insofar as the Special Master recommended that an injunction issue.

Nebraska's basic Exception is to the Findings and Conclusion of the Special Master that ownership of areas that have formed since July 12, 1943, should be deter-

[10] Report 68–69. Claimants to titles to areas of Nottleman Island rested at least in part on the Nebraska law of adverse possession. Report 121–126.

[11] *Id.*, at 174–175.

[12] *Id.*, at 201; see n. 5, *supra*.

mined under the law of the State in which they formed, the boundary fixed by the Compact being the line that determines in which State they formed.[13] This pertains to the 21 areas and part of a 22d that lie north of Omaha. See n. 4, *supra.*

Although the Special Master recommended, and we agree, that claimants of title to these areas as against Iowa may also have the opportunity to show title "good in Nebraska" on the Compact date, July 12, 1943,[14] Nebraska offered no proof to support such a claim as to any of the areas. Nebraska does contend, however, that any accretions to Nebraska riparian lands that cross the Compact boundary line into Iowa, caused when the river moves gradually and imperceptibly, should be declared to accrue to the Nebraska riparian owner under Nebraska law, since under Nebraska law the boundary of the Nebraska owner moves with the thalweg or main navigable channel, regardless of which State the movement is in. The Special Master rejected that contention. We agree that the contention is without merit for the reasons stated in *Tyson* v. *State of Iowa,* 283 F. 2d 802 (CA8 1960). That was a condemnation action by the United States in which the question was the ownership of an island at Tyson Bend, one of the areas north of Omaha to which Iowa claims ownership. See n. 4, *supra.* The island had formed between the designed channel and a main channel created when the river escaped from the designed channel between 1943 and 1948. The island had then become connected to the Nebraska shore when the designed channel filled with sediment after a 1952 flood. The Corps of Engineers determined to dredge a canal in the designed channel to place the river back in the designed channel.

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[13] *Id.,* at 193.

[14] *Id.,* at 192.

Condemnation of an easement on the island was necessary to carry the project forward, and the question of ownership of the island had to be settled to determine who was entitled to compensation. The Tyson claimants claimed the land as an accretion to Nebraska land or river beds belonging to them. The State of Iowa claimed it as an island formed over the state-owned river bed in Iowa under the Iowa doctrine of state ownership. The Court of Appeals for the Eighth Circuit held that the ownership of the island should be determined by the law of the State in which the land was situated, that is, by the law of Iowa, since the island was on the Iowa side of the Compact boundary. The Court of Appeals expressly rejected the same contention urged upon us by Nebraska, holding, in agreement with the District Court in the case, that "the Nebraska law of accretion did not operate to create riparian rights within the territorial limits of Iowa." 283 F. 2d, at 811. Hence, whether the Nebraska riparian owner has title to the accretions that cross the boundary into Iowa is determined by Iowa law. Nebraska argues that *Tyson* was wrongly decided. We do not agree. *Tyson* is consistent with what the Court said in *Arkansas* v. *Tennessee*, 246 U. S. 158, 175–176 (1918):

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . *But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary*

line from where otherwise it should be located." (Emphasis added.)

The States may submit a proposed decree in accord with this opinion. If the States cannot agree, the Special Master is requested, after appropriate hearing, to prepare and submit a recommended decree.

It is so ordered.

AFFILIATED UTE CITIZENS OF UTAH ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 70–78. Argued October 18, 1971—Decided April 24, 1972

The Ute Partition Act was designed to provide for the partition and distribution of the tribe's assets between the mixed-blood and full-blood members; for termination of federal supervision over the trust and restricted property of mixed-bloods; and for a development program for the full-bloods with a view toward terminating federal supervision of them. In addition to cash and land, the tribe owned oil, gas, and mineral rights (principally oil shale deposits underlying the reservation) and unadjudicated and unliquidated claims against the Government. The Act provided that upon publication of the final membership rolls, the tribal business committee (representing the full-bloods) and the mixed-bloods' "authorized representatives" were to start dividing assets that could be practicably distributed, based upon the relative number of persons in each group, with a further plan to be prepared for distributing the mixed-bloods' assets to individual members. After each mixed-blood had received his distributive share, federal restrictions were to be removed except as to the remaining interest in tribal property. The assets not practicably distributable were to be jointly managed by the committee and the mixed-bloods' representatives. Under the Act, the mixed-bloods, by way of selecting their representatives, organized the Affiliated Ute Citizens (AUC) as an unincorporated association, which, as authorized by the statute, created the Ute Distribution Corp. (UDC) to manage (jointly with the committee) the oil, gas, and mineral rights and unadjudicated or unliquidated claims against the Government as part of the plan for distributing assets to individual mixed-bloods. UDC issued 10 shares of its stock in the name of each mixed-blood and made an agreement with First Security Bank of Utah (the bank) for the bank to become the UDC stock transfer agent, the bank to hold the stock certificates and issue receipts to the shareholders. Under UDC's articles, a mixed-blood shareholder desiring to dispose of his stock prior to August 27, 1964, had to give first-refusal rights to tribe members, absent which no stock sale was valid. A sale could be made to a non-

member only if no member accepted the offer, and the price could be no lower than that offered to members. The UDC certificates were to bear a stamp revealing these conditions, along with a caveat that the certificates did not represent ordinary corporate shares; that the stock's future value could not be determined; and that the stock should be retained for the shareholder's benefit. Upon the sale to a nonmember, the seller was to furnish an affidavit to the reservation superintendent stating the amount he received. The federal trust relationship involving the divided assets contemplated by the Act was terminated by proclamation of the Secretary of the Interior effective August 27, 1961. *AUC Case.* AUC, acting for itself and its 490 mixed-blood members, in April 1968 sued the United States for a pro rata distribution to the individual members of the mixed-bloods' 27% of the mineral estate underlying the reservation and for a determination that AUC and not UDC was entitled to manage that property jointly with the committee. Jurisdiction was asserted under 25 U. S. C. § 345 and 28 U. S. C. §§ 1399 and 2409. The District Court granted the Government's motion to dismiss, and the Court of Appeals affirmed. *Reyos Case.* In February 1965, a group of mixed-bloods (12 of whom were selected as "bellwether plaintiffs" for initial trial purposes) sued the bank, two bank employees (Gale and Haslem) and (under the Tort Claims Act) the United States, charging violations of the Securities Exchange Act of 1934 and the SEC's Rule 10b–5, which prohibits "any device, scheme, or artifice to defraud" in connection with securities transactions. The claimed violations involved plaintiffs' sales of UDC shares in 1963 and 1964 (some made before and some after August 27). The District Court, *inter alia,* found that mixed-bloods had sold 1,387 shares of UDC stock to nonmembers, Haslem buying 50 shares (after August 27, 1964) and Gale 63 (44 before that date and 19 after). The 12 plaintiffs sold 120 shares, Gale buying 10 and Haslem six. Thirty-two other whites bought shares from mixed-bloods during the 1963–1964 period. In 1964–1965 mixed-bloods sold shares at $300 to $700 per share, while the price range on transfer between whites was $500 to $700. Gale and Haslem received various commissions for their services in connection with transfers of UDC stock from mixed-bloods to nonmembers, solicited contracts for open purchases of UDC stock on bank premises during business hours, and prepared the necessary affidavits and other papers, using, at best, "informal" procedures. The District Court

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concluded that the Government had reason to know of the sales to non-Indians and failed to perform its duty to the mixed-bloods to discourage and prevent the sales; that Gale and Haslem had devised a scheme to acquire for themselves and others UDC shares at less than their fair value; and that the bank had notice of the employees' improper activities. The court found that each of the defendants (with certain exceptions applicable to the Government) was liable to each of the 12 plaintiffs, and assessed damages by using a $1,500-per-share value for the UDC stock as of the times of the sales. The court reached that figure after taking account of the oil shale deposits underlying the reservation, along with gas, coal, and other minerals; petitioners' remaining interests in an Indian Claims Commission award; unadjudicated claims against the Government; the specific prices for UDC share sales by mixed-bloods to whites; the fact that mixed-bloods (who were under heavy selling pressure) were not so well informed about the stock's potential value as were whites; the influence of Gale's and Haslem's improper activities on selling prices; opinion evidence as to worth above $700 per share; and other factors. The measure of damages for each seller, the court held, was the difference between the fair value of the UDC shares at the time of sale and the fair value of what the seller received. The Court of Appeals reversed in substantial part, holding that after the 1961 termination the Government owed petitioners no duty in connection with the UDC stock sales; that Gale and Haslem were liable only where they personally purchased shares for their own accounts or for resale to an undisclosed principal at a higher price, but not in other instances, where their actions were held to be only ministerial; and that the bank's liability did not extend beyond Gale's and Haslem's. The District Court's valuation of the UDC stock was held to lack record support, and the proper measure of damages was held to be "the profit made by the defendant on resale" or, absent a resale, "the prevailing market price at the time of the purchase from the plaintiffs." A petition for certiorari covering both the *AUC* case and the *Reyos* case was granted. *Held:*

The AUC Case

1. The *AUC* case was properly dismissed for want of jurisdiction as an unconsented suit against the United States. Pp. 141–143.

(a) Though under 25 U. S. C. § 345, the Government has consented to suits to enforce an Indian's right to an allotment of land, the AUC's claimed interest in the mineral estate has not been made subject to an allotment. Pp. 142–143.

(b) Title 28 U. S. C. §§ 1399 and 2409 are inapplicable, since those provisions confer jurisdiction with respect to partition suits where the United States is a tenant in common or a joint tenant, which is not the situation here. P. 143.

2. The UDC and not the AUC is entitled to manage jointly with the full-bloods the oil, gas, and mineral rights underlying the reservation. Pp. 143–144.

The Reyos Case

3. The Ute Partition Act and the 1961 termination proclamation ended federal supervision over the trust and the mixed-bloods' restricted property, including the UDC shares, and the right of first refusal specified in the UDC corporate articles created no duty on the Government's part to the terminated mixed-bloods seeking to sell their shares. Pp. 149–150.

4. The Court of Appeals correctly determined that Gale and Haslem violated Rule 10b–5 by making misstatements of material fact, namely, that the prevailing market price of the UDC shares was the figure at which their purchases were made, but the court erred in holding that there was no violation of the Rule unless the record disclosed evidence of reliance on the misrepresentations. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of his decision. Pp. 150–154.

5. The bank's liability is coextensive with that of Gale and Haslem. P. 154.

6. The correct measure of damages under § 28 of the Securities Exchange Act of 1934 is the difference between the fair value of what the mixed-blood seller received for his stock and what he would have received had there been no fraudulent conduct (except where the defendant received more than the seller's actual loss, in which case the defendant's profit is the amount of damages). Pp. 154–155.

7. The District Court's valuation of $1,500 per UDC share has adequate record support. Pp. 155–156.

431 F. 2d 1349, affirmed; 431 F. 2d 1337, affirmed in part, reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. DOUGLAS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 157. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Parker M. Nielson argued the cause and filed briefs for petitioners.

A. Raymond Randolph, Jr., argued the cause for the United States *pro hac vice*. With him on the brief for the United States and brief for the Securities and Exchange Commission as *amicus curiae* for petitioner Reyos were *Solicitor General Griswold, Assistant Attorney General Kashiwa, Edmund B. Clark, G. Bradford Cook, Walter P. North, Theodore Sonde,* and *Richard S. Seltzer*. *Marvin J. Bertoch* argued the cause for respondents First Security Bank of Utah, N. A., et al., and filed a brief for First Security Bank of Utah. *Richard Clare Cahoon* filed a brief for respondent Gale. *Hardin A. Whitney* filed a brief for respondent Haslem.

Briefs of *amici curiae* were filed by *John S. Boyden, Stephen G. Boyden,* and *George C. Morris* for the Ute Indian Tribe of the Uintah and Ouray Reservations et al.; by *Arthur Lazarus, Jr.,* and *Milton Eisenberg* for the Association on American Indian Affairs, Inc.; and by *David H. Getches* and *Wallace L. Duncan* for the Native American Rights Fund.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

These two consolidated cases center in the Ute Indian Supervision Termination Act of August 27, 1954 (hereafter Partition Act), 68 Stat. 868, as amended, 70 Stat. 936 and 76 Stat. 597, 25 U. S. C. §§ 677–677aa; the Securities Exchange Act of 1934, 48 Stat. 881, as amended, §§ 3 (a)(4) and (5), 10 (b) and 15 (c)(1), 15 U. S. C. §§ 78c (a)(4) and (5), 78j (b) and 78*o* (c)(1); the emergence of Affiliated Ute Citizens of the State of Utah (AUC), an unincorporated association, and of Ute Distribution Corp. (UDC), a Utah corporation; and the alleged victimization of Indian shareholders in their sales of UDC shares.

I

Background

The Ute Partition Act [1] pertained to the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah. At the time of the Act's adoption the tribe had a membership of about 1,765,[2] consisting of 439 mixed-bloods [3]

[1] The Act was one of a series of termination statutes enacted primarily in the years 1954–1956. See, for example, the Menominee Indian Termination Act of June 17, 1954, 68 Stat. 250, 25 U. S. C. § 891 *et seq.;* the Klamath Indian Termination of Supervision Act of Aug. 13, 1954, 68 Stat. 718, 25 U. S. C. § 564 *et seq.;* the Act of Aug. 13, 1954, 68 Stat. 724, 25 U. S. C. § 691 *et seq.* (Western Oregon); the Act of Aug. 23, 1954, 68 Stat. 768, 25 U. S. C. § 721 *et seq.* (Alabama and Coushatta); the Act of Sept. 1, 1954, 68 Stat. 1099, 25 U. S. C. § 741 *et seq.* (Paiute); the Act of Aug. 1, 1956, 70 Stat. 893, 25 U. S. C. § 791 *et seq.* (Wyandotte); the Act of Aug. 2, 1956, 70 Stat. 937, 25 U. S. C. § 821 *et seq.* (Peoria); and the Act of Aug. 3, 1956, 70 Stat. 963, 25 U. S. C. § 841 *et seq.* (Ottawa). Others were the Act of Sept. 21, 1959, 73 Stat. 592, 25 U. S. C. § 931 *et seq.* (Catawba), and the Act of Sept. 5, 1962, 76 Stat. 429, 25 U. S. C. § 971 *et seq.* (Ponca).

The termination policy exemplified by these acts is not without its criticism. See the President's Special Message to the Congress on Indian Affairs, July 8, 1970, Public Papers of the Presidents, Richard Nixon, 1970, pp. 564–576.

[2] S. Rep. No. 1632, 83d Cong., 2d Sess., 5 (1954); H. R. Rep. No. 2493, 83d Cong., 2d Sess., 2 (1954).

[3] Counsel for the petitioners advised us at oral argument that the term "mixed-blood" is a slur and is offensive and that the preferred description is "terminated Utes." Tr. of Oral Arg. 4. Section 2 of the Act, however, defines as a "full-blood" a member of the tribe "who possesses one-half degree of Ute Indian blood and a total of Indian blood in excess of one-half, excepting those who become mixed-bloods by choice . . . ." It defines as a "mixed-blood" a member of the tribe who does not fall within the full-blood class, and one who becomes a mixed-blood by choice. 25 U. S. C. §§ 677a (b) and (c). The provision as to choice is § 4 of the Act, 25 U. S. C. § 677c. Inasmuch as the statute specifically employs the terms "full-blood" and "mixed-blood," we feel compelled, for purposes of consistency and clarity, to do the same. No slur or offense whatsoever is intended.

and 1,326 full-bloods. Section 1 of the Act stated its purpose, namely "to provide for the partition and distribution of the assets of the . . . Tribe . . . between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property." 25 U. S. C. § 677. The then-estimated value of the cash, accounts receivable, and land owned by the tribe was $20,702,885.[4] The tribe possessed additional assets consisting of oil, gas, and mineral rights (principally oil shale deposits underlying the reservation), and unadjudicated and unliquidated claims against the United States.

Section 8 of the Act, 25 U. S. C. § 677g, called for the preparation of the rolls of full-blood members and mixed-blood members, and for the finality of those rolls. Section 5, as amended, 25 U. S. C. § 677d, provided that upon the publication of the final rolls "the tribe shall thereafter consist exclusively of full-blood members," and that mixed-blood members "shall have no interest therein except as otherwise provided" in the Act.

Section 10, 25 U. S. C. § 677i, stated that when the final membership rolls had been published, the tribal business committee, representing the full-bloods, and the "authorized representatives" of the mixed-bloods were to "commence a division of the assets of the tribe that are then susceptible to equitable and practicable

[4] S. Rep. No. 1632, 83d Cong., 2d Sess., 6 (1954); H. R. Rep. No. 2493, 83d Cong., 2d Sess., 4 (1954). The cash was attributable primarily to the tribe's 60% share of the settlement judgment of $31,000,000 obtained in *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950). See the Act of Aug. 21, 1951, § 2, 65 Stat. 194, 25 U. S. C. § 672. The remaining 40% was awarded to the Southern Ute Tribe.

distribution." This was to be based "upon the relative number of persons comprising the final membership roll of each group." [5] Upon the adoption of a plan of division, the mixed-bloods were to prepare a further plan for the distribution of their group's assets to the individual members. § 13 of the Act, 25 U. S. C. § 677*l*. After each mixed-blood had received his distributive share, directly or in whole or in part through the device of a corporation or other entity in which he had an interest, federal restrictions were to be removed except as to any remaining interest in tribal property, that is, the unadjudicated or unliquidated claims against the United States, gas, oil, and mineral rights, and other tribal assets not susceptible of equitable and practicable distribution. § 16, 25 U. S. C. § 677*o*. The Secretary of the Interior then was to issue a proclamation "declaring that the Federal trust relationship to such individual is terminated." § 23, 25 U. S. C. § 677v. Those assets, such as the mineral estate, excepted from the division plans, were to be "managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group." § 10, 25 U. S. C. § 677i.

Section 6 of the Act, 25 U. S. C. § 677e, authorized the mixed-bloods to organize, to adopt a constitution and bylaws, and to provide, by that constitution, for the selection of authorized representatives with power "to take any action that is required by [the Act] to be taken by the mixed-blood members as a group."

Pursuant to this grant of power the mixed-bloods, in 1956, organized AUC as an unincorporated association. AUC's constitution, Art. V, § 1 (b), empowered its board

[5] The final membership rolls were published April 5, 1956. 21 Fed. Reg. 2208–2220 (1956). The rolls listed 490 mixed-bloods and 1,314 full-bloods, a total of 1,804. The ratio was 27.16186% mixed-bloods and 72.83814% full-bloods.

of directors to delegate to corporations organized in accordance with the Act "such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized."

UDC was incorporated in 1958 with the stated purpose "to manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe . . . all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe . . . are now, or may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation . . . ."

The formation of UDC was part of the plan formulated by the mixed-bloods for the distribution of assets to the individual members of their group. By a resolution adopted by a 42–5 vote at a special meeting at which a quorum was present and voting, AUC approved the articles of UDC. The Secretary also approved them. In January 1959 the AUC directors by a unanimous vote (5–0) irrevocably delegated authority to UDC—and, indeed, to two other Utah corporations of the mixed-bloods, Antelope-Sheep Range Company and Rock Creek Cattle Range Company, see § 13 of the Act, 25 U. S. C. § 677*l* (3)—to accomplish the purposes for which they were formed. UDC then issued 10 shares of its capital stock in the name of each mixed-blood Ute, a total of 4,900 shares. UDC and First Security Bank of Utah, N. A. (the bank), executed a written agreement dated December 31, 1958, by which the bank became transfer agent for UDC stock. UDC apparently also decided at this time not to deliver the certificates for its

shares to the shareholders but, instead, to deposit them with the bank; the bank was then to issue receipts to the respective shareholders. Counsel advised the bank that this was "because of some rather unfavorable experiences had in the Indian service with the loss of valuable instruments."

UDC's articles provided that if a mixed-blood shareholder determined to sell or dispose of his UDC stock at any time prior to August 27, 1964, that is, within 10 years from the date of the Partition Act, he was first to offer it to members of the tribe, both mixed-blood and full-blood, in a form approved by the Secretary; that no sale of stock prior to that date was valid unless and until that offer was made; and that if the offer was not accepted by any member of the tribe, the sale to a nonmember could then be made but at a price no lower than that offered to the members.[6] The articles further provided that all UDC stock certificates should have stamped thereon a prescribed legend referring to those sale conditions.[7] The certificates so issued bore that legend. In addition, each certificate had on its face, in red lettering, a warning that the certificate did not represent stock in an ordinary business corporation, that its future value or return could not be determined, and that the stock should not be sold or encumbered by its owner,

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[6] A like right of first refusal with respect to a mixed-blood's disposal of his interest in real estate within 10 years is specified in § 15 of the Act, 25 U. S. C. § 677n.

[7] "Transfer of this certificate at any time prior to August 27, 1964, to a person not a member of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, as defined in Public Law 671—83rd Congress, approved August 27, 1954, 68 Stat. 868, shall be invalid unless the certificate of the Superintendent of the Uintah and Ouray Reservation is endorsed thereon showing that a prior and proper offer has been made to members of said tribe in accordance with law and the regulations of the Secretary of the Interior."

but should be retained and preserved for the benefit of the shareholder and his family.[8]

The UDC shareholders were advised of the substance of this warning on several occasions after the stock had been issued. UDC's president testified that many responded by saying that their shares were their business and that they could do as they pleased with them.

In August 1960 the Secretary promulgated regulations setting forth the procedure a mixed-blood should follow before effecting a pre-August 27, 1964, sale of his stock to an outsider. 25 Fed. Reg. 7620; 25 CFR §§ 243.1–243.12 (1962). These prescribed for the sale of the stock essentially the same procedure required under §15 of the Act, 25 U. S. C. § 677n, for a mixed-blood's disposal of his interest in real property. 25 CFR § 243.12 (1962). The seller first notified the superintendent of the reservation of the price and terms on which his offer was made. 25 CFR § 243.5 (1962). The superintendent then notified UDC and the business committee of the tribe and posted notices about the reservation. 25 CFR § 243.6 (1962). If no member accepted the offer, the superintendent so informed the offeror, who was then free to sell "at any time within six months thereafter to any person at the same or greater price and upon the same terms and conditions

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[8] "WARNING

"This certificate does not represent stock in an ordinary business corporation. This corporation is organized for the purpose of distributing to the stockholders in the future their respective shares in the proceeds or income from all claims and assets in which the mixed-blood members of the Utah Indian Tribe of the Uintah and Ouray Reservation, Utah have or will have an interest under the provisions of Public Law 671—83rd Congress, approved August 27, 1954, 68 Stat. 868, as amended. The future value of, or return on, this stock cannot be determined. This stock certificate should neither be sold nor encumbered by the owner thereof, but should be retained and preserved for the benefit of the stockholder and the stockholder's family."

upon which it was offered to the members." 25 CFR § 243.8 (1962). Upon the sale to a nonmember, the seller furnished an affidavit to the superintendent stating the amount he had received. The superintendent prepared a certificate that the stock had first been offered to members and sent the certificate to the bank. The bank attached it to the stock book.

The termination proclamation, contemplated by § 23 of the Act, 25 U. S. C. § 677v, was issued and published by the Secretary effective at midnight August 27, 1961. 26 Fed. Reg. 8042. This, of course, did not purport to terminate the trust status of the undivided assets. Cf. *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968).

II

The Present Litigation

A. *The AUC Case.* In April 1968 AUC, on its own behalf and as representative of its 490 mixed-blood members, instituted suit against the United States seeking (1) pro rata distribution to the individual members of the 27.16186%[9] of the mineral estate underlying the reservation, and (2) a determination that AUC and not UDC is entitled to manage that property jointly with the business committee of the full-bloods. Jurisdiction was asserted under 25 U. S. C. § 345 (authorizing an action against the United States for an Indian allotment claim, see n. 11, *infra*), and under 28 U. S. C. §§ 1399 and 2409 (authorizing a partition action where the United States is a tenant in common or a joint tenant).

The United States moved to dismiss the complaint for want of subject matter jurisdiction and for failure to

[9] This figure appears to have been misstated as 27.1686% in the complaint. The error was carried forward into the respective opinions of the District Court and of the Court of Appeals. 431 F. 2d 1349, 1350.

state a claim. The District Court granted this motion on both grounds. The Tenth Circuit affirmed. 431 F. 2d 1349 (1970).

B. *The Reyos Case.* In February 1965 Anita R. Reyos and 84 other mixed-bloods sued the bank, two of the bank's employee-officers, John B. Gale and Verl Haslem, and certain automobile dealers,[10] charging violations of the Securities Exchange Act of 1934 and of Rule 10b–5 of the Securities and Exchange Commission. By subsequent amendment to the complaint the United States was added as a party defendant. Jurisdiction was asserted under 28 U. S. C. §§ 1331 and 1346 (b).

The parties selected 12 "bellwether plaintiffs" from among the 85 for purposes of initial trial. These plaintiffs had sold UDC shares to various nonmembers including the defendants Gale and Haslem. The sales took place after the proclamation of termination of the federal trust relationship.

The District Court held the bank and the two officer defendants liable for damages to each of the 12 plaintiffs. It also ruled that the United States possessed, and did not fulfill, a duty to prevent the sales and thus, under the Federal Tort Claims Act, 28 U. S. C. §§ 2671–2680, was liable for damages with respect to sales that had taken place before August 27, 1964. It also ruled, however, that the United States was not liable with respect to sales after that date or to two plaintiffs whom the court found to be contributorily negligent. The court determined that the fair value of the UDC stock at the times of the plaintiffs' sales was $1,500 per share. The damages against the two individuals and the bank were fixed in the aggregate at $129,519.56. Damages against the United States were fixed in the aggregate at

[10] The dealers settled and the actions against them have been dismissed.

$77,947.35. Judgment was entered accordingly under Fed. Rule Civ. Proc. 54 (b).

The several defendants appealed and the 12 plaintiffs whose cases were tried cross-appealed. The Tenth Circuit reversed and remanded. 431 F. 2d 1337 (1970).

C. On the petition of AUC and the 12 plaintiffs this Court granted certiorari in both cases because of the importance of the issues for Indians whose federal supervision is in the course of termination. 402 U. S. 905 (1971).

III

The AUC Case

The two cases, although different, have their roots in the formation of UDC, and it is not inappropriate that the cases were consolidated and are here together.

A. As hereinabove noted, AUC in its litigation seeks two things: outright distribution of the mixed-bloods' percentage of the mineral estate, and a determination that AUC is entitled to participate in management with the business committee of the full-bloods.

There is, and can be, no dispute that the United States holds title to the land, including the mineral interest, constituting the Uintah and Ouray Reservation. Prior to the 1954 Act all members of the tribe were the beneficial owners of that mineral interest. The division of the interest between the full-bloods, on the one hand, and the mixed-bloods, on the other, came about by reason of the Act and of the procedures set in motion by the Act. To the extent, therefore, that AUC, by its suit, seeks distribution to the individual mixed-bloods whom it purports to represent, it is necessarily a suit against the United States.

The United States, of course, may not be sued without its consent. *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941). This long-established principle has been

applied in actions for the possession or conveyance of real estate. *Malone* v. *Bowdoin*, 369 U. S. 643 (1962). It has been applied to Indian lands the title to which the United States holds in trust. *Minnesota* v. *United States*, 305 U. S. 382 (1939); *Oregon* v. *Hitchcock*, 202 U. S. 60, 70 (1906). It has been applied, specifically, in a suit by an Indian who has a beneficial interest in land. *Naganab* v. *Hitchcock*, 202 U. S. 473 (1906). *Naganab*, therefore, controls the distribution aspect of the AUC case unless the United States has consented to be sued.

The consent, it is claimed, exists in 25 U. S. C. § 345.[11] This, however, is an allotment statute. Allotment is a term of art in Indian law. U. S. Dept. of the Interior, Federal Indian Law 774 (1958). It means a selection of specific land awarded to an individual allottee from a common holding. *Reynolds* v. *United States*, 174 F. 212 (CA8 1909). See the Act of February 8, 1887, 24 Stat. 388, as amended, 25 U. S. C. §§ 331–334. Section 345 authorizes, and provides governmental consent for, only actions for allotment. *First Moon* v. *White Tail*, 270 U. S. 243 (1926); *Harkins* v. *United States*, 375 F. 2d 239 (CA 10 1967); *United States* v. *Preston*, 352 F. 2d 352, 355 (CA9 1965). See *Arenas* v. *United States*, 322 U. S. 419 (1944).

Although the interest in the mineral estate that AUC seeks to have conveyed pro rata to the individual mixed-

[11] Title 25 U. S. C. § 345 reads:

"All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land . . . or who claim to have been unlawfully denied or excluded from any allotment . . . may commence and prosecute . . . any action . . . in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action . . . involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant) . . . ."

bloods perhaps could be made the subject of an allotment, it has never been so subjected. Neither is it appurtenant to an allotment. The interest relates to the tribal land of the reservation. It remains tribal property. Further, § 10 of the 1954 Act, 25 U. S. C. § 677i, itself contemplates and provides specifically for the nonallocation of that interest.

We therefore readily conclude that § 345 has no application here. Neither do 28 U. S. C. §§ 1399 and 2409 afford a basis for jurisdiction; they have application only to partition suits where the United States is a tenant in common or a joint tenant. That is not this situation.

The AUC action, therefore, was properly dismissed for want of jurisdiction.

B. AUC's prayer for a determination as to management rights deserves a further word.

The Ute Partition Act was the result of proposals initiated by the tribe itself. See H. R. Rep. No. 2493, 83d Cong., 2d Sess., 2 (1954); S. Rep. No. 1632, 83d Cong., 2d Sess., 7 (1954). The tribe also drafted the Act. *Id.*, at 3 and 7, respectively. It provided for organization by the mixed-bloods and "for the selection of authorized representatives" with power to take any action the Act required to be taken by the mixed-bloods as a group. § 6, 25 U. S. C. § 677e. AUC was formed in 1956 and was the product of this organizational power. Its constitution and bylaws authorize the delegation of necessary or desirable power or authority to corporations formed by the mixed-bloods. UDC was formed by mixed-bloods in 1958 specifically to manage mineral rights and unadjudicated claims against the United States jointly with the business committee. AUC approved UDC's articles and by resolution delegated authority to UDC to act in accord with those articles.

These steps were taken pursuant to the Partition Act.

UDC's formation and structure were contemplated by the Act, and AUC itself created and breathed life and vigor into UDC. All this was within Congress' power. *United States* v. *Waller*, 243 U. S. 452, 462 (1917); *Tiger* v. *Western Investment Co.*, 221 U. S. 286 (1911). UDC's legitimacy was further recognized by its anticipatory exemption from federal income tax, under the Act of August 2, 1956, § 3, 70 Stat. 936; by the freeing of its shares from mortgage, levy, attachment, and the like, so long as the shares remained in the ownership of the original shareholder or his heirs or legatees, under the Act of September 25, 1962, 76 Stat. 597, 598; and by the inclusion of UDC by name as an entity to receive the trust fund resulting from the judgment against the United States in favor of the Confederated Bands of Ute Indians, under the Act of August 1, 1967, 81 Stat. 164, as amended, 82 Stat. 171, 25 U. S. C. § 676a.

Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods.

IV

The Reyos Case

In this case the 85 plaintiffs sought damages for alleged violations by the defendants, in connection with sales by the plaintiffs of their UDC shares, of § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b),[12]

[12] "SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the

and of Rule 10b–5 [13] promulgated thereunder by the Securities and Exchange Commission, 17 CFR § 240.10b–5. The sales in question were effected in 1963 and 1964; some were made before, and some were made after, the expiration of the Secretary's specified 10-year period following the passage of the Ute Partition Act.

The claims center in the facts that the bank, by its agreement with UDC, was the transfer agent for UDC shares; that it had physical possession of all the stock certificates with their specific legend of caution and warning; that, because of the bank's possession, a shareholder's possible contact with, and awareness of, the legend was minimized; that the bank handled the documents implementing the first-refusal procedure; and that the mixed-blood who contemplated the sale of his shares was compelled to deal through the bank.

The District Court made lengthy and meticulously detailed findings of fact. Some are not challenged by any of the parties. Others are challenged. The following, we conclude, are adequately supported by the record:

1. In 1959, after the bank was retained as transfer agent, UDC's attorney wrote the bank advising it that UDC's directors, by formal minute, had instructed him

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Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[13] Rule 10b–5, 17 CFR § 240.10b–5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

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to ask the bank "to discourage the sale of stock of the Ute Distribution Corporation by any of its stockholders and to emphasize and stress to the said stockholders the importance of retaining said stock." The letter further stated, "[W]e trust you will impress upon anyone desiring to make a transfer that there is no possible way of determining the true value of this stock."

2. The bank maintained a branch office in Roosevelt, Utah. Many mixed-bloods resided in that area. This was, "among other things for the purpose of facilitating and assisting mixed-bloods in the transfer" of the UDC stock. Defendants Gale and Haslem were the bank's assistant managers at Roosevelt. They were also notaries public.

3. With respect to most of the sales of UDC stock by the 12 plaintiffs to nonmembers of the tribe, either Gale or Haslem prepared and notarized the necessary transfer papers, including signature guarantees and the affidavits of the sellers to the effect that they were receiving not less than the price at which the shares had been offered to members of the tribe. The procedure with respect to the preparation and execution of these affidavits was informal at best. In at least one case the affidavit was signed in blank; in another Gale dissuaded the seller from reading the affidavit before she signed it.

4. Some of the affidavits do not accurately describe the sales to which they relate. Although they state that the sales were for cash, some sellers actually received second-hand automobiles or other tangible property. The superintendent relied on the recitals in the affidavits in preparing his authenticating certificates that were transmitted to the bank as transfer agent.

5. During 1963 and 1964 mixed-bloods sold 1,387 shares of UDC stock. All were sold to nonmembers of the tribe. Haslem purchased 50 of these himself (all after August 27, 1964), and Gale purchased 63 (44

before that date and 19 after). The 113 shares Haslem and Gale purchased constituted 8⅓% of the total sold by mixed-bloods during those two years. The 12 plaintiffs sold 120 shares; of these Gale purchased 10 and Haslem purchased six.[14] They paid cash for the shares they purchased. Thirty-two other white men bought shares from mixed-bloods during the period.

6. In 1964 and 1965 UDC stock was sold by mixed-bloods at prices ranging from $300 to $700 per share. Shares were being transferred between whites, however, at prices from $500 to $700 per share.

7. Gale and Haslem possessed standing orders from non-Indian buyers. About seven of these were from outside the State. Some of the prospective purchasers maintained deposits at the bank for the purpose of ready consummation of any transaction.

8. The two men received various commissions and gratuities for their services in facilitating the transfer of UDC stock from mixed-bloods to non-Indians. Gale supplied some funds as sales advances to the mixed-blood sellers. He and Haslem solicited contracts for open purchases of UDC stock and did so on bank premises and during business hours.

9. In connection with all this, the bank sought individual accounts from the tribal members.

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[14] On or about July 8, 1964, Gale bought five shares from Glen Reed at $350 per share. He sold them in August for $530 per share. After August 27, 1964, in three separate transactions, he purchased five shares from Letha Harris Wopsock. He sold three of these at a higher price; the record is silent as to whether he sold the other two at a price in excess of his cost. On or about August 31, 1964, Haslem bought five shares from Reed at $400 and resold them immediately. In November 1964 he purchased one share from Joseph Arthur Workman for $350. He transferred the Workman share to his brother. The record does not indicate Haslem's transfer prices.

10. The United States mails and other instrumentalities of interstate commerce were employed by the bank and by Gale and Haslem in connection with the transfer of the UDC shares.

The District Court concluded:

1. As to the United States: The Government had reason to know that the mixed-bloods were selling UDC shares to non-Indians under circumstances of a doubtful nature. It owed a duty to the mixed-bloods to discourage and prevent those sales. Its failure to perform that duty was the proximate cause of the sales.

2. As to Gale and Haslem: The two men had devised a plan or scheme to acquire, for themselves and others, shares in UDC from mixed-bloods. In violation of their duty to make a fair disclosure, they succeeded in acquiring shares from mixed-bloods for less than fair value.

3. As to the bank: It was put upon notice of the improper activities of its employees, Gale and Haslem, knowingly created the apparent authority on their part, and was responsible for their conduct. Its liability was joint and several with that of Gale and Haslem.

The District Court then ruled that each of the defendants, that is, the United States, the bank, Gale, and Haslem, was liable to each of the 12 plaintiffs (32 transactions involving 122 shares), except that the Government was not liable with respect to any sale after August 27, 1964, or with respect to sales made by plaintiffs Workman and Oran F. Curry because of their knowledge and contributory negligence. Using a $1,500-per-share value for UDC stock, as of the times of the sales, the above-described judgments for $129,519.56 and $77,947.35 were computed and entered.

The Court of Appeals reversed in substantial part. It held:

1. As to the United States: There was no duty on the part of the Government to the petitioners, in connection

with their sales of UDC stock, that continued after the 1961 termination. No form of wardship or of federal trust relationship existed with respect to the shares after that date. Thus, damages under the Tort Claims Act were not to be awarded. 431 F. 2d, at 1340–1343.

2. As to Gale and Haslem: They were liable only in those instances where the employee personally purchased shares for his own account or for resale to an undisclosed principal at a higher price. With respect to the other transactions, the two employees performed essentially ministerial functions related to share transfers and their conduct was not sufficient to incur liability. The court remanded the case on the issue of damages, 431 F. 2d, at 1345–1349.

3. As to the bank: There was no violation of any duty it may have had to plaintiffs by its contract with UDC. This was so despite the facts that Gale and Haslem were active in encouraging a market for the UDC stock and that the bank may have had some indirect benefit by way of increased deposits. 431 F. 2d, at 1343–1345. The bank, however, was liable to the extent Gale and Haslem were liable. 431 F. 2d, at 1346–1347.

In summary, then, the Court of Appeals decided the *Reyos* case in favor of the United States and, in large part, in favor of the bank; held Gale and Haslem personally liable, and the bank also, only with respect to a few sales; and, as to those sales, remanded the case on the issue of damages.

We consider, in turn, the posture of the several defendants.

A. *The United States.* The proclamation of August 26, 1961, was contemplated by § 23 of the Act, 25 U. S. C. § 677v. To the extent the nature of the property so permitted, this marked the fulfillment of the purpose set forth in § 1 of the Act, 25 U. S. C. § 677, namely, the termination of federal supervision over the trust and

restricted property of the mixed-bloods. It stated specifically that the mixed-blood thereupon "shall not be entitled to any of the services performed for Indians because of his status as an Indian." This broad reference obviously included the shares of UDC although the undivided interests in turn held by UDC and shared with the full-bloods remained subject to restrictions after the proclamation. § 1*f* (a), 25 U. S. C. § 677*o* (a). The UDC stock itself, however, was free of restriction; as to it, federal termination was complete. Each mixed-blood could sell his shares as he wished and to whom he pleased, subject thereafter only to the restrictions imposed by UDC's own articles. There was no remaining governmental authority over those shares. And without such authority there can be no liability on the part of the United States for failure to restrain a sale.

The petitioners' argument that the right of first refusal created a duty on the part of the Government does not persuade us. This first-refusal right with respect to UDC stock is provided for in the corporation's articles and thus was created by UDC itself. The corporation's action in this respect imposed no duty on the United States. To be sure, the first-refusal right was undoubtedly patterned after the first refusal provided for a period with respect to real estate in § 15 of the Act, 25 U. S. C. § 677n, and the Secretary's regulations were made applicable to the first-refusal right in stock "as far as practicable." 25 CFR § 243.12 (1962). But this parallel created no obligation.

B. *Gale and Haslem.* Section 10 of the Securities Exchange Act of 1934, 15 U. S. C. § 78j, makes it unlawful "for any person, directly or indirectly," to "employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention" of any rule "the Commission may prescribe as necessary or appropriate in the public interest

or for the protection of investors." One such rule so prescribed is Rule 10b–5. This declares that, in connection with the purchase or sale of any security, it shall be "unlawful for any person, directly or indirectly," (1) "To employ any device, scheme, or artifice to defraud," (2) "To make any untrue statement of a material fact" or to omit to state a material fact so that the statements made "in the light of the circumstances," are misleading, and (3) "To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

These proscriptions, by statute and rule, are broad and, by repeated use of the word "any," are obviously meant to be inclusive. The Court has said that the 1934 Act and its companion legislative enactments[15] embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC* v. *Capital Gains Research Bureau,* 375 U. S. 180, 186 (1963). In the case just cited the Court noted that Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.,* at 195. This was recently said once again in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U. S. 6, 12 (1971).

In the light of the congressional philosophy and purpose, so clearly emphasized by the Court, we conclude that the Court of Appeals viewed too narrowly the activities of defendants Gale and Haslem. We would

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[15] The Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.;* the Public Utility Holding Company Act of 1935, 49 Stat. 838, as amended, 15 U. S. C. § 79 *et seq.;* the Trust Indenture Act of 1939, 53 Stat. 1149, as amended, 15 U. S. C. § 77aaa *et seq.;* and the Investment Company Act of 1940, 54 Stat. 789, as amended, 15 U. S. C. § 80a–1 *et seq.*

agree that if the two men and the employer bank had functioned merely as a transfer agent, there would have been no duty of disclosure here. But, as the Court of Appeals itself observed, the record shows that Gale and Haslem "were active in encouraging a market for the UDC stock among non-Indians." 431 F. 2d, at 1345. They did this by soliciting and accepting standing orders from non-Indians. They and the bank, as a result, received increased deposits because of the development of this market. The two men also received commissions and gratuities from the expectant non-Indian buyers. The men, and hence the bank, as the Court found, were "entirely familiar with the prevailing market for the shares at all material times." 431 F. 2d, at 1347. The bank itself had acknowledged, by letter to AUC in January 1958, that "it would be our duty to see that these transfers were properly made" and that, with respect to the sale of shares, "the bank would be acting for the individual stockholders." The mixed-blood sellers "considered these defendants to be familiar with the market for the shares of stock and relied upon them when they desired to sell their shares." 431 F. 2d, at 1347.

Clearly, the Court of Appeals was right to the extent that it held that the two employees had violated Rule 10b–5; in the instances specified in that holding the record reveals a misstatement of a material fact, within the proscription of Rule 10b–5 (2), namely, that the prevailing market price of the UDC shares was the figure at which their purchases were made.

We conclude, however, that the Court of Appeals erred when it held that there was no violation of the Rule unless the record disclosed evidence of reliance on material fact misrepresentations by Gale and Haslem. 431 F. 2d, at 1348. We do not read Rule 10b–5 so restrictively. To be sure, the second subparagraph of the rule

specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first and third subparagraphs are not so restricted. These defendants' activities, outlined above, disclose, within the very language of one or the other of those subparagraphs, a "course of business" or a "device, scheme, or artifice" that operated as a fraud upon the Indian sellers. *Superintendent of Insurance* v. *Bankers Life & Casualty Co., supra.* This is so because the defendants devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts that reasonably could have been expected to influence their decisions to sell. The individual defendants, in a distinct sense, were market makers, not only for their personal purchases constituting 8⅓% of the sales, but for the other sales their activities produced. This being so, they possessed the affirmative duty under the Rule to disclose this fact to the mixed-blood sellers. See *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d 1167 (CA2 1970). It is no answer to urge that, as to some of the petitioners, these defendants may have made no positive representation or recommendation. The defendants may not stand mute while they facilitate the mixed-bloods' sales to those seeking to profit in the non-Indian market the defendants had developed and encouraged and with which they were fully familiar. The sellers had the right to know that the defendants were in a position to gain financially from their sales and that their shares were selling for a higher price in that market. Cf., in contrast, § 18 (a) of the Act, 15 U. S. C. § 78r (a), and § 11 (a) of the Securities Act of 1933, 15 U. S. C. § 77k (a).

Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a

reasonable investor might have considered them important in the making of this decision. See *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 384 (1970); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 849 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969); 6 L. Loss, Securities Regulation 3876–3880 (1969 Supp. to 2d ed. of Vol. 3); A. Bromberg, Securities Law, Fraud—SEC Rule 10b–5, §§ 2.6 and 8.6 (1967). This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact. *Chasins* v. *Smith, Barney & Co.*, 438 F. 2d, at 1172.

Gale and Haslem engaged in more than ministerial functions. Their acts were clearly within the reach of Rule 10b–5. And they were acts performed when they were obligated to act on behalf of the mixed-blood sellers.[16]

C. *The Bank.* The liability of the bank, of course, is coextensive with that of Gale and Haslem.

V

Damages

A. The District Court determined that the measure of damages for each seller was the difference between the fair value of the UDC shares at the time of his sale and the fair value of what the seller received, including any amount paid to him in settlement by the automobile dealers. The Court of Appeals held that the measure was "the profit made by the defendant on resale" or, if no resale was made or if the resale was not at arm's length, was "the prevailing market price at the time of the purchase from the plaintiffs." 431 F. 2d, at 1348–1349.

[16] Liability here, of course, is not predicated on any broker or dealer concept under § 15 (c)(1) of the Act, 15 U. S. C. § 78*o* (c)(1). A bank is excluded from the respective definitions of those terms in §§ 3 (a)(4) and (5), 15 U. S. C. §§ 78c (a)(4) and (5).

In our view, the correct measure of damages under § 28 of the Act, 15 U. S. C. § 78bb (a), is the difference between the fair value of all that the mixed-blood seller received and the fair value of what he would have received had there been no fraudulent conduct, see *Myzel* v. *Fields*, 386 F. 2d 718, 748 (CA8 1967), cert. denied, 390 U. S. 951 (1968), except for the situation where the defendant received more than the seller's actual loss. In the latter case damages are the amount of the defendant's profit. See *Janigan* v. *Taylor*, 344 F. 2d 781, 786 (CA1 1965), cert. denied, 382 U. S. 879 (1965).

B. The District Court, as has been noted, arrived at a value for the UDC stock of $1,500 per share. The Court of Appeals concluded that this valuation was not substantiated by the record. The petitioners argue for a value in the neighborhood of $28,000 per share, a figure concededly dependent in large part on an estimate of the ultimate worth of oil shale.

We agree with both the District Court and the Court of Appeals that the $28,000 figure is unrealistic and speculative. On the other hand, reasonable inferences may be drawn and the District Court, as the trier of fact on this record, is not restricted to actual sale prices in a market so isolated and so thin as this one. See generally *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946); *Harry Alter Co.* v. *Chrysler Corp.*, 285 F. 2d 903, 907 (CA7 1960); *O'Malley* v. *Ames*, 197 F. 2d 256 (CA8 1952).

In arriving at the $1,500 figure the District Court considered the existence of extensive oil shale deposits on the reservation; the possession by those deposits of substantial present value and of great potential value; the presence of gas, coal, and other minerals; the administrative cost deposit retained by the United States with respect to each member of the tribe; each petitioner's remaining interest in the 1965 award by the Indian

Claims Commission; the existence of claims against the United States not yet fully adjudicated; and the specific prices at which UDC shares were sold by mixed-bloods and between white persons. The court noted that prices paid for the shares were somewhat influenced by the improper activities of Gale and Haslem; by the excess of sellers over buyers; by the fact the typical Indian seller was not so well informed about the potential value of the stock as was the typical non-Indian buyer; by the fact that the Indian seller was under heavy economic pressure to sell; by opinion evidence as to worth in excess of $700 per share; and by the fact that some portion of the depressant factors in the market was attributable to the defendants. On the other hand, the court noted that not all the market's depressant factors were so attributable to the defendants and that the tribe itself, despite the opportunity so to do, had declined to purchase UDC shares at prices ranging from $350 to $700.

The court then expressed the belief that the problem was not to determine the ultimate worth of the undivided mineral interest underlying the shares or to be governed solely by the sale prices. It concluded that on the preponderance of the evidence the stock was worth $1,500 per share at the times of the petitioners' respective sales.

In the light of all this, and on balance, we find ourselves in agreement with the District Court, and in disagreement with the Court of Appeals, and we conclude that the District Court's $1,500 valuation has sufficient support in the record.

The judgment of the Court of Appeals in the *AUC* case is affirmed. The judgment of the Court of Appeals in the *Reyos* case is affirmed insofar as it concerns the United States; insofar as it concerns the bank and the individual defendants, that judgment is affirmed in part and is reversed in part, as hereinabove set forth, and the case is remanded for further proceedings. Costs are

allowed the individual petitioners as against the bank and the individual defendants.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

I join in the Court's opinion and judgment as to the individual and corporate respondents. I would go further, however, and also hold that the United States has waived its sovereign immunity to petitioners' claims.

Petitioners are an unincorporated association of mixed-blood Utes and individuals of that group. They sought damages, in the District Court, for fraudulent securities transactions, for negligence by agents of the Federal Government, and for the deprivation of statutory rights granted them by Congress. The District Court awarded damages on the first two claims, but dismissed the third for want of jurisdiction and for failure to state a claim. The Court of Appeals reversed the two damage awards and affirmed the dismissal of the third action. 431 F. 2d 1337, 1349 (CA10 1970).

In the Ute Indian Supervision Termination Act of 1954, Congress sought

> "to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; for the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe; and for a development program for the full-blood members thereof, to assist them in preparing for termination of Federal supervision over their property." 25 U. S. C. § 677.

That the various property interests in the reservation were to be treated differently is evidenced by the Committee Reports accompanying this legislation:

> "An essential provision of the proposed legislation is the division between the two groups, on the basis of their relative numbers, of all tribal assets, *except oil, gas, and mineral rights, and unadjudicated claims against the United States. These undivided assets will continue to be owned and administered jointly by the two groups.* The responsibility for making this division is on the Indians themselves, but if they fail to agree within 12 months after the rolls are completed, the Secretary of the Interior is authorized to make the division." S. Rep. No. 1632, 83d Cong., 2d Sess., 6 (1954) (emphasis added).

Accord, H. R. Rep. No. 2493, 83d Cong., 2d Sess. (1954).

Involved here is the mineral estate in the Reservation lands. Because these "gas, oil, and mineral rights" were "not susceptible of equitable and practicable distribution" among the individual Indians, they were to be "managed jointly by the Tribal Business Committee [of the full-blood Utes] and the authorized representatives of the mixed-blood group." 25 U. S. C. § 677i. The benefits were to be shared proportionately according to the relative numbers of each group on their final membership rolls. *Ibid.*

Congress set forth an explicit procedure for the selection of the "authorized representatives" of the mixed-blood Utes who, with the Tribal Business Committee, were to have managerial powers over the mineral estate in the reservation. Central to this selection was the requirement for "a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary" of the Interior. 25 U. S. C. § 677e. The petitioner Affiliated Ute Citizens was created under this procedure on April 4, 1956. Two

years later, the Ute Distribution Corp. was formed and there lies the root of the present litigation.

The Ute Distribution Corp. was not chartered according to the guidelines mandated by Congress. Rather than following the requirement for a majority vote of the mixed-blood members, it was created by the five board members of Affiliated Ute. Approval of its articles of incorporation was by a vote of only 42 to 5—far short of the majority of the 490 mixed-blood Utes required by 25 U. S. C. § 677e. After incorporation, 10 shares of stock were issued to each of the mixed-blood Utes. Despite the flaws in Ute Distribution Corp.'s formation, the Bureau of Indian Affairs treated it, and not Affiliated Ute Citizens, as the "authorized representative." Payments for mineral rights were thus made to Ute Distribution which, in turn, passed them on to its shareholders as dividends.

Because the Bureau of Indian Affairs viewed the transfer of mineral interests to Ute Distribution as one to the authorized representative, cf. 25 U. S. C. § 677*o* (a), the restrictions on the transfer of individual property were removed and the federal trust relationship purportedly was terminated. 25 U. S. C. § 677v; 26 Fed. Reg. 8042. It was upon this basis that the courts below held that the individual mixed-blood Utes and the Affiliated Utes no longer had cognizable interests in the mineral estate of the reservation.

Even if the federal trust relationship was terminated as to individual property interests, it does not follow that the trust relationship was also terminated as to the group interest in the mineral rights. The United States continued to owe significant obligations and duties with regard to these mineral interests. See 25 U. S. C. §§ 677i, 677n, and 677*o*. See Berger, Indian Mineral Interest—A Potential for Economic Advancement, 10 Ariz. L. Rev. 675 (1968). It was to obtain the enjoyment of the

statutory benefits and to redress their injury that petitioners brought this action against the United States.

The waiver of sovereign immunity for claims relating to land allotments first appeared in an amendment to the Indian Appropriations Act of 1894, 28 Stat. 305, as amended, 25 U. S. C. § 345:

> "All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress . . . or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States . . . ."

By a further amendment in 1901, Congress made explicit what had previously been only implicit: that it intended to allow allotment claimants to bring actions against "the United States as party defendant." Act of Feb. 6, 1901, § 1, 31 Stat. 760. See H. R. Rep. No. 1714, 56th Cong., 1st Sess. (1900); S. Rep. No. 2040, 56th Cong., 2d Sess. (1901).

Affiliated Ute Citizens argued that their asserted right to a portion of the mineral estate of the reservation was an "allotment or . . . parcel of land" which they had been unlawfully denied and that they were therefore able to bring this action against the United States under § 345. See, *e. g., United States* v. *Pierce,* 235 F. 2d 885 (CA9 1956); *Gerard* v. *United States,* 167 F. 2d 951 (CA9 1948). The courts below rejected this view, with the Court of Appeals saying:

> "This section of the statute is obviously intended to provide relief to the Indians entitled to possession of allotments and similar interests. The cases and

> statutory law have ascribed to the word 'allotment' a well recognized meaning. The nature of the interest sought to be protected and secured does not resemble that described in the statute." 431 F. 2d, at 1350.

We owe to the Indians a beneficent interpretation of remedial legislation designed to right past wrongs. *United States* v. *Kagama,* 118 U. S. 375, 384–385. The Court of Appeals, however, gave only a limited interpretation to this waiver of sovereign immunity against Indians' claims. The Solicitor General likewise argues for a limited application of this waiver and would apply it only to claims concerning "a tract of land set aside out of a common holding and awarded to an individual allottee." [1]

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . . ." *Choate* v. *Trapp,* 224 U. S. 665, 675.

See also *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 79; U. S. Dept. of the Interior, Federal Indian Law 565–566 (1958).

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[1] A similar argument was made in *United States* v. *Pierce,* 235 F. 2d 885, 888 (CA9 1956):

"The United States contends that the jurisdictional prerequisite for any action under [§ 345] . . . is the existence of a specific allotment selection which has been *unlawfully denied* by the Secretary of the Interior . . . ." The court rejected this argument saying that it was "based upon an unreasonable limitation as to the purpose of the statute," *ibid.,* and went on to sustain the Indians' claims to income from the land.

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The waiver of sovereign immunity should not be so limited as the Solicitor General and the courts below suggest. The 1894 Act, now codified in 25 U. S. C. § 345, was plainly intended to give Indians a means of enforcing their rights to governmental grants of interests in realty.[2] To be sure, the section was enacted in an era during which these grants usually took the form of individual possessory interests in realty, Gilbert & Taylor, Indian Land Questions, 8 Ariz. L. Rev. 102, 112 (1966); but that should not prevent this remedial section from applying to new forms of interests in mineral rights or to other forms of property.[3]

Nor does the plain language of § 345 suggest a contrary result. It speaks of an "allotment or any parcel of land."[4] Certainly the modern, conventional way of allotting mineral rights is through fractional interests created by contracts or through stock interests in corporations to which those allotments are transferred. If

[2] *First Moon* v. *White Tail*, 270 U. S. 243, relied upon by the Solicitor General, is not to the contrary because it dealt with the transfer of property occasioned by an Indian's death. Such transfers were removed from the scope of § 345 and "entrusted to the exclusive cognizance of the Secretary of the Interior by the Act of June 25, 1910, c. 431, 36 Stat. 855 . . . ." 270 U. S., at 244.

[3] In *Scholder* v. *United States*, 428 F. 2d 1123, 1129 (CA9 1970), for example, the court noted "that section [345] is not limited to actions seeking to compel the issuance of an allotment in the first instance. It serves also to protect 'the interests and rights of the Indian in his allotment or patent after he has acquired it.'" The court then held that challenges to liens placed upon Indian lands fell within the jurisdictional scope of § 345. Certainly the divestiture of interests in lands, alleged here, should not be entitled to a lesser degree of protection than the imposition of a lien.

[4] Section 345 also requires that the property interest be one derived "under any law of Congress" or "by virtue of any Act of Congress." *E. g.*, *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60. In the present case, the rights asserted are those derived from the Ute Indian Supervision Termination Act of 1954.

Congress has waived sovereign immunity for claims relating to fee interests in realty, it surely could not have intended that formal requirements of the art of conveyancy destroy that waiver of immunity for lesser interests in realty. Particularly is that so where, as here, the lesser interest seems to have been granted through an error by the Bureau of Indian Affairs.

The limited retention of sovereign immunity in the Ute termination act further supports petitioners' claims. Title 25 U. S. C. § 677i provides that the "partition [of tribal assets] shall give rise to no cause of action against the United States." The Committee Reports and the statute itself indicate that the mineral interests were not to be the subject of partition as the word is used in that Act. S. Rep. No. 1632, 83d Cong., 2d Sess., 6 (1954); H. R. Rep. No. 2493, 83d Cong., 2d Sess. (1954); 25 U. S. C. § 677i. Thus, the failure of Congress to extend sovereign immunity to the unpartitioned mineral interests here in issue strongly suggests that immunity has been waived as to these claims. Moreover, the only other immunity provision of the Act, 25 U. S. C. § 677h, applies only where there has been consent by the authorized representatives of the mixed-blood group which was necessarily absent because of the defect in the creation of the Ute Distribution Corp.

WEBER *v.* AETNA CASUALTY & SURETY CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 70-5112. Argued February 28, 1972—Decided April 24, 1972

Decedent, who died as a result of injuries received during the course of his employment, had maintained a household with four legitimate minor children, one unacknowledged minor child, and petitioner, to whom he was not married. His wife had been committed to a mental hospital. A second illegitimate child was born posthumously. Under Louisiana's workmen's compensation law unacknowledged illegitimate children are not within the class of "children," but are relegated to the lesser status of "other dependents," and may recover only if there are not enough surviving dependents in the preceding classes to exhaust the maximum benefits. The four legitimate children were awarded the maximum allowable compensation and the two illegitimate children received nothing. The Louisiana courts sustained the statutory scheme, holding that *Levy* v. *Louisiana,* 391 U. S. 68, was not controlling. *Held:* Louisiana's denial of equal recovery rights to the dependent unacknowledged illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment, as the inferior classification of these dependent children bears no significant relationship to the recognized purposes of recovery that workmen's compensation statutes were designed to serve. *Levy* v. *Louisiana, supra,* followed; *Labine* v. *Vincent,* 401 U. S. 532, distinguished. Pp. 167–176.

257 La. 424, 242 So. 2d 567, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post,* p. 176. REHNQUIST, J., filed a dissenting opinion, *post,* p. 177.

Vanue B. Lacour argued the cause and filed a brief for petitioner.

W. Henson Moore argued the cause and filed a brief for respondents.

Norman Dorsen and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question before us, on writ of certiorari to the Supreme Court of Louisiana,[1] concerns the right of dependent unacknowledged, illegitimate children to recover under Louisiana workmen's compensation laws benefits for the death of their natural father on an equal footing with his dependent legitimate children. We hold that Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimates violates the Equal Protection Clause of the Fourteenth Amendment. *Levy* v. *Louisiana*, 391 U. S. 68 (1968); *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968).

On June 22, 1967, Henry Clyde Stokes died in Louisiana of injuries received during the course of his employment the previous day. At the time of his death Stokes resided and maintained a household with one Willie Mae Weber, to whom he was not married. Living in the household were four legitimate minor children, born of the marriage between Stokes and Adlay Jones Stokes who was at the time committed to a mental hospital. Also living in the home was one unacknowledged illegitimate child born of the relationship between Stokes and Willie Mae Weber. A second illegitimate child of Stokes and Weber was born posthumously.

On June 29, 1967, Stokes' four legitimate children, through their maternal grandmother as guardian, filed a claim for their father's death under Louisiana's work-

[1] *Stokes* v. *Aetna Casualty & Surety Co.*, 257 La. 424, 242 So. 2d 567 (1970).

men's compensation law.[2] The defendant employer and its insurer impleaded Willie Mae Weber who appeared and claimed compensation benefits for the two illegitimate children.

Meanwhile, the four legitimate children had brought another suit for their father's death against a third-party tortfeasor, which was settled for an amount in excess of the maximum benefits allowable under workmen's compensation. The illegitimate children did not share in this settlement. Subsequently, the employer

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[2] La. Rev. Stat. § 23:1232 (1967) establishes the schedule of payment of workmen's compensation benefits to various classifications of dependents as follows:

"Payment to dependents shall be computed and divided among them on the following basis:

"(1) If the widow or widower alone, thirty-two and one-half per centum of wages.

"(2) If the widow or widower and one child, forty-six and one-quarter per centum of wages.

"(3) If the widow or widower and two or more children, sixty-five per centum of wages.

"(4) If one child alone, thirty-two and one-half per centum of wages of deceased.

"(5) If two children, forty-six and one-quarter per centum of wages.

"(6) If three or more children, sixty-five per centum of wages.

"(7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages.

"(8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents."

in the initial action requested the extinguishment of all parties' workmen's compensation claims by reason of the tort settlement.

The trial judge awarded the four legitimate children the maximum allowable amount of compensation and declared their entitlement had been satisfied from the tort suit settlement. Consequently, the four legitimate children dismissed their workmen's compensation claim. Judgment was also awarded to Stokes' two illegitimate offspring to the extent that maximum compensation benefits were not exhausted by the four legitimate children. Since such benefits had been entirely exhausted by the amount of the tort settlement, in which only the four dependent legitimate offspring participated, the two dependent illegitimate children received nothing.

I

For purposes of recovery under workmen's compensation, Louisiana law defines children to include "only legitimate children, stepchildren, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code Articles 203, 204, and 205." [3] Thus, legitimate children and acknowledged ille-

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[3] La. Rev. Stat. § 23:1021 (3). The relevant provisions for acknowledgment of an illegitimate child are as follows:

La. Civ. Code, Art. 202 (1967):

"Illegitimate children who have been acknowledged by their father, are called natural children; those who have not been acknowledged by their father, or whose father and mother were incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards."

La. Civ. Code, Art. 203:

"The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in presence of two witnesses, by the father and mother or either of them, whenever it

gitimates may recover on an equal basis. Unacknowledged illegitimate children, however, are relegated to the lesser status of "other dependents" under § 1232 (8) of the workmen's compensation statute [4] and may recover *only* if there are not enough surviving dependents in the preceding classifications to exhaust the maximum allowable benefits. Both the Louisiana Court of Appeal [5] and a divided Louisiana Supreme Court [6] sustained these statutes over petitioner's constitutional objections, holding that our decision in *Levy, supra,* was not controlling.

We disagree. In *Levy,* the Court held invalid as denying equal protection of the laws, a Louisiana statute which barred an illegitimate child from recovering for the wrongful death of its mother when such recoveries by legitimate children were authorized. The Court there decided that the fact of a child's birth out of wedlock bore no reasonable relation to the purpose of wrongful-death statutes which compensate children for the death of a mother. As the Court said in *Levy:*

> "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would." *Levy* v. *Louisiana,* 391 U. S., at 72.

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shall not have been made in the registering of the birth or baptism of such child."

La. Civ. Code, Art. 204:

"Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception; however, such acknowledgment may be made if the parents should contract a legal marriage with each other."

[4] See n. 2, *supra.*

[5] 232 So. 2d 328 (La. App. 1969).

[6] *Stokes* v. *Aetna Casualty & Surety Co.,* see n. 1, *supra.*

The court below sought to distinguish *Levy* as involving a statute which absolutely excluded *all* illegitimates from recovery, whereas in the compensation statute in the instant case acknowledged illegitimates may recover equally with legitimate children and "the unacknowledged illegitimate child is not *denied* a right to recover compensation, he being merely relegated to a less favorable position as are other dependent relatives such as parents . . . ." *Stokes* v. *Aetna Casualty & Surety Co.*, 257 La. 424, 433–434, 242 So. 2d 567, 570 (1970). The Louisiana Supreme Court likewise characterized *Levy* as a tort action where the tortfeasor escaped liability on the fortuity of the potential claimant's illegitimacy, whereas in the present action full compensation was rendered, and "no tort feasor goes free because of the law." *Id.*, at 434, 242 So. 2d, at 570.

We do not think *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in *Levy*, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover.[7] The legitimate children and the illegitimate children all lived in the home of the deceased and were

[7] The affinity and dependency on the father of the posthumously born illegitimate child are, of course, not comparable to those of offspring living at the time of their father's death. This fact, however, does not alter our view of the case. We think a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child, which the Louisiana statutes fail to do.

equally dependent upon him for maintenance and support. It is inappropriate, therefore, for the court below to talk of relegating the unacknowledged illegitimates "to a less favorable position as are other dependent relatives such as parents." The unacknowledged illegitimates are *not* a parent or some "other dependent relative"; in this case they are *dependent children*, and as such are entitled to rights granted other *dependent children*.

Respondents contend that our recent ruling in *Labine* v. *Vincent*, 401 U. S. 532 (1971), controls this case. In *Labine*, the Court upheld, against constitutional objections, Louisiana intestacy laws which had barred an acknowledged illegitimate child from sharing equally with legitimate children in her father's estate. That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. *Id.*, at 538. The Court has long afforded broad scope to state discretion in this area.[8] Yet the substantial state interest in providing for "the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents," *Labine* v. *Vincent*, 229 So. 2d 449, 452 (La. App. 1969), is absent in the case at hand.

Moreover, in *Labine* the intestate, unlike deceased in the present action, might easily have modified his daughter's disfavored position. As the Court there remarked:

> "Ezra Vincent could have left one-third of his property to his illegitimate daughter had he bothered

[8] The Court over a century ago voiced strong support for state powers over inheritance: "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 8 How. 490, 493 (1850). See *Lyeth* v. *Hoey*, 305 U. S. 188, 193 (1938).

> to follow the simple formalities of executing a will. He could, of course, have legitimated the child by marrying her mother in which case the child could have inherited his property either by intestate succession or by will as any other legitimate child." *Labine, supra,* at 539.

Such options, however, were not realistically open to Henry Stokes. Under Louisiana law he could not have acknowledged his illegitimate children even had he desired to do so.[9] The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them.

Both the statute in *Levy* and the statute in the present case involve state-created compensation schemes, designed to provide close relatives and dependents of a deceased a means of recovery for his often abrupt and accidental death. Both wrongful-death statutes and workmen's compensation codes represent outgrowths and modifications of our basic tort law. The former alleviated the harsh common-law rule under which "no person could inherit the personal right of another to recover for

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[9] La. Civ. Code, Art. 204, see n. 3, *supra,* prohibits acknowledgment of children whose parents were incapable of contracting marriage at the time of conception. Acknowledgment may only be made if the parents could contract a legal marriage with each other. Decedent in the instant case remained married to his first wife—the mother of his four legitimate children—until his death. Thus, at all times he was legally barred from marrying Willie Mae Weber, the mother of the two illegitimate children. It therefore was impossible for him to acknowledge legally his illegitimate children and thereby qualify them for protection under the Louisiana Workmen's Compensation Act. See also *Williams* v. *American Emp. Ins. Co.,* 237 La. 101, 110 So. 2d 541 (1959), where the Louisiana Supreme Court held that a posthumously born illegitimate child cannot be classified as a child entitled to workmen's compensation benefits, as defined under La. Rev. Stat. § 23:1021 (3).

tortious injuries to his body"; [10] the latter removed difficult obstacles to recovery in work-related injuries by offering a more certain, though generally less remunerative, compensation. In the instant case, the recovery sought under the workmen's compensation statute was in lieu of an action under the identical death statute which was at issue in *Levy*.[11] Given the similarities in the origins and purposes of these two statutes, and the similarity of Louisiana's pattern of discrimination in recovery rights, it would require a disregard of precedent and the principles of *stare decisis* to hold that *Levy* did not control the facts of the case before us. It makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy;* the discrimination remains apparent.

II

Having determined that *Levy* is the applicable precedent, we briefly reaffirm here the reasoning which produced that result. The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey* v. *Doud*, 354 U. S. 457 (1957); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Gulf, Colorado & Santa Fé R. Co.* v. *Ellis*, 165 U. S. 150 (1897); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny, *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Harper* v. *Virginia Board of Elections*, 383 U. S.

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[10] See 391 U. S. 73, 76 (1968) (Harlan, J., dissenting in *Glona* v. *American Guarantee & Liability Insurance Co.*, and *Levy* v. *Louisiana*).

[11] La. Civ. Code, Art. 2315.

663 (1966). The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

The Louisiana Supreme Court emphasized strongly the State's interest in protecting "legitimate family relationships," 257 La., at 433, 242 So. 2d, at 570, and the regulation and protection of the family unit have indeed been a venerable state concern. We do not question the importance of that interest; what we do question is how the challenged statute will promote it. As was said in *Glona:*

> "[W]e see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Glona* v. *American Guarantee & Liability Insurance Co., supra,* at 75.

Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation.

It may perhaps be said that statutory distinctions between the legitimate and illegitimate reflect closer family relationships in that the illegitimate is more often not under care in the home of the father nor even supported by him. The illegitimate, so this argument runs, may thus be made less eligible for the statutory recoveries and inheritances reserved for those more likely to be within the ambit of familial care and affection. Whatever the merits elsewhere of this contention, it is not compelling in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's recovery,

and where the acknowledgment so necessary to equal recovery rights may be unlikely to occur or legally impossible to effectuate even where the illegitimate child may be nourished and loved.

Finally, we are mindful that States have frequently drawn arbitrary lines in workmen's compensation and wrongful-death statutes to facilitate potentially difficult problems of proof. Nothing in our decision would impose on state court systems a greater burden in this regard. By limiting recovery to dependents of the deceased, Louisiana substantially lessens the possible problems of locating illegitimate children and of determining uncertain claims of parenthood.[12] Our decision fully

[12] The most relevant sections of the Louisiana statutes defining dependency for purposes of workmen's compensation recovery read as follows:

La. Rev. Stat. § 23:1231:

"For injury causing death within two years after the accident there shall be paid to the legal dependent of the employee, actually and wholly dependent upon his earnings for support at the time of the accident and death, a weekly sum as hereinafter provided, for a period of four hundred weeks. . . ."

La. Rev. Stat. § 23:1251:

"The following persons shall be conclusively presumed to be wholly and actually dependent upon the deceased employee:

. . . . . .

"(3) A child under the age of eighteen years . . . upon the parent with whom he is living at the time of the injury of the parent."

The above section thus qualifies the illegitimate children in this case as dependents.

La. Rev. Stat. § 23:1252:

"In all other cases, the question of legal and actual dependency in whole or in part, shall be determined in accordance with the facts as they may be at the time of the accident and death . . . ."

Naturally, the variations of dependency claims coming to Louisiana courts under these sections are many, but Louisiana has consistently required valid evidence of dependency for recovery. See, *e. g., Sandidge* v. *Aetna Casualty & Surety Co.*, 29 So. 2d 522 (La.

respects Louisiana's choice on this matter. It will not expand claimants for workmen's compensation beyond those in a direct blood and dependency relationship with the deceased and it avoids altogether diffuse questions of affection and affinity which pose difficult probative problems. Our ruling requires equality of treatment between two classes of persons the genuineness of whose claims the State might in any event be required to determine.

The state interest in legitimate family relationships is not served by the statute; the state interest in minimizing problems of proof is not significantly disturbed by our decision. The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve.

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.[13] Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent

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App. 1947), where children, living with their mother who was separated from the father, in order to receive the maximum compensation for the father's death, must establish that they were wholly dependent upon the father for their support.

[13] See, *e. g.*, Gray & Rudovsky, The Court Acknowledges the Illegitimate: *Levy* v. *Louisiana* and *Glona* v. *American Guarantee & Liability Insurance Co.*, 118 U. Pa. L. Rev. 1 (1969). A comprehensive study of the legal status of illegitimacy and the effects thereof is H. Krause, Illegitimacy: Law and Social Policy (1971); reviewed by Wadlington, 58 Va. L. Rev. 188 (1972).

the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth [14] where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.

Reversed and remanded.

MR. JUSTICE BLACKMUN, concurring in the result.

For me, La. Civ. Code, Art. 204, is the provision in the State's statutory structure that proves fatal for this workmen's compensation case under the focus of constitutional measurement. The Article operated to deny Henry Stokes the ability even to acknowledge his illegitimates so that they might qualify as children within the definition provided by La. Rev. Stat. § 23:1021 (3). This is so because the decedent (inasmuch as he was then married to Adlay Jones Stokes and remained married to her the rest of his life) and the mother were incapable of contracting marriage at the time of conception and thereafter. This bar, indeed, under the Court's decided cases, denied equal protection to the illegitimates. Cf. *Labine* v. *Vincent*, 401 U. S. 532, 539 (1971).

I thus give primary emphasis to the presence of Art. 204 and, I believe, far more emphasis than does the Court. If that statute did not exist or were inapplicable, the case might be a different one. While the Court refers to Art. 204, and to a degree relies upon it, *ante*, at 171 n. 9, it seems to me that it does so only secondarily. I read the opinion as flatly granting dependent unacknowledged illegitimate children full equality with dependent legitimate children and therefore as striking down the Lou-

[14] See *Graham* v. *Richardson*, 403 U. S. 365 (1971); *Hunter* v. *Erickson*, 393 U. S. 385 (1969); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); and see also *Hirabayashi* v. *United States*, 320 U. S. 81 (1943).

isiana statutory scheme even for the situation where the father has the power to acknowledge his illegitimates but refrains from doing so. In other words, the Court holds the Louisiana system unconstitutional with respect to illegitimate dependent children wholly apart from the barrier of Art. 204. Certainly, the first paragraph of the opinion is to this effect.

In deciding this case, I need not, and would not, go that far. I would let the resolution of that issue await its appropriate presentation.

MR. JUSTICE REHNQUIST, dissenting.

This case is distinguishable from *Levy* v. *Louisiana*, 391 U. S. 68 (1968), and could be decided the other way on the basis of this Court's more recent decision in *Labine* v. *Vincent*, 401 U. S. 532 (1971). Yet I certainly do not regard the Court's decision as an unreasonable drawing of the line between *Levy* and *Labine*, and would not feel impelled to dissent if I regarded *Levy* as rightly decided. I do not so regard it. I must agree with Mr. Justice Harlan's dissenting opinion, which described *Levy* and its companion case, *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U. S. 73 (1968), as "constitutional curiosities," and called the Court's method of reaching the result "a process that can only be described as brute force." *Id.*, at 76.

Since *Levy* was a constitutional holding, its doctrine is open to later re-examination to a greater extent than if it had decided a question of statutory construction or some other nonconstitutional issue. See *Coleman* v. *Alabama*, 399 U. S. 1, 22 (1970) (BURGER, C. J., dissenting); *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235, 259 (1970) (Black, J., dissenting); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405–410 (1932) (Brandeis, J., dissenting).

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The Equal Protection Clause was adopted as a part of the Fourteenth Amendment in 1868. Five years later Mr. Justice Miller delivered this Court's initial construction of that amendment in his classic opinion in *Slaughter-House Cases*, 16 Wall. 36 (1873). After setting forth an account of the adoption of that amendment, he described the account as a "recapitulation of events, almost too recent to be called history, but which are familiar to us all." 16 Wall., at 71. Referring to the Equal Protection Clause, he said:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." 16 Wall., at 81.

In nearly 100 years of subsequent adjudication concerning this clause, the Court has adhered to the notion expressed in the *Slaughter-House Cases* that racial classifications are "suspect." See, *e. g.*, *Loving* v. *Virginia*, 388 U. S. 1 (1967). But during that same period of time, this Court has proved Mr. Justice Miller a bad prophet with respect to nonracial classification.

As noted in *Levy*, in the field of economic and social legislation, the Court has given great latitude to the legislatures in making classifications. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); *Morey* v. *Doud*, 354 U. S. 457 (1957). The test has been whether there is any rational basis for the legislative classification. See *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 556 (1947). "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S. 420, 425–426

(1961). Under this test, so long as the "discrimination is founded upon a reasonable distinction, or difference in state policy," *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 528 (1959), the Court will not attempt to weigh its social value or determine whether the classification might have been more finely drawn. *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963). However, this salutary principle has been departed from by the Court in recent years, as pointed out in its opinion here, where the Court has felt that the classification has affected what it conceives to be "fundamental personal rights."

The difficulty with this approach, devoid as it is of any historical or textual support in the language of the Equal Protection Clause, is that it leaves apparently to the Justices of this Court the determination of what are, and what are not, "fundamental personal rights." Those who framed and ratified the Constitution and the various amendments to it chose to select certain particular types of rights and freedoms, and to guarantee them against impairment by majority action through legislation or otherwise. While the determination of the extent to which a right is protected may result in the drawing of fine lines, the fundamental sanction of the right itself is found in the language of the Constitution, and not elsewhere. The same is unfortunately not true of the doctrine of "fundamental personal rights." This body of doctrine created by the Court can only be described as a judicial superstructure, awkwardly engrafted upon the Constitution itself.

The Court's experience with similar superstructures has not been a happy one. The first part of this century saw the evolution of the doctrine of "freedom of contract" which was held by the Court during part of that time to be a part of the Fourteenth Amendment's requirement that no person be deprived of life, liberty, or property without due process of law. This doctrine

had its just deserts in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391 (1937), where Mr. Chief Justice Hughes, speaking for the Court, said:

> "The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."

In a similar vein it may be said that the Constitution does not speak of "fundamental personal rights," but speaks of the equal protection of the laws and prohibits the denial thereof. Two years ago, this Court in *Dandridge* v. *Williams*, 397 U. S. 471 (1970), recognized that the broad latitude accorded state legislatures by both the contemporary history and the text of the Equal Protection Clause was not limited to statutes regulating business or industry. There, in a case dealing with the administration of public welfare assistance which, the Court noted, "involves the most basic economic needs of impoverished human beings," the Court nonetheless quite properly applied the "rational basis" constitutional standard. 397 U. S., at 485. It reaffirmed the historically correct statement of the meaning of equal protection in these words:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

> mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69–70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U. S. 420, 426."

The Court in today's opinion, recognizing that two different standards have been applied in equal protection cases, apparently formulates a hybrid standard which is the basis of decision here. The standard is a two-pronged one:

> "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"

Surely there could be no better nor more succinct guide to sound legislation than that suggested by these two questions. They are somewhat less useful, however, as guides to constitutional adjudication. How is this Court to determine whether or not a state interest is "legitimate"? And how is the Court to know when it is dealing with a "fundamental personal right"?

While the Court's opinion today is by no means a sharp departure from the precedents on which it relies, it is an extraordinary departure from what I conceive to be the intent of the framers of the Fourteenth Amendment and the import of the traditional presumption of constitutionality accorded to legislative enactments. Nowhere in the text of the Constitution, or in its plain implications, is there any guide for determining what is a "legitimate" state interest, or what is a "fundamental personal right." The traditional police power of the

States has been deemed to embrace any measure thought to further the well-being of the State in question, subject only to the specific prohibitions contained in the Federal Constitution. That Constitution of course contains numerous guarantees of individual liberty, which I would have no trouble describing as "fundamental personal liberties," but the right of illegitimate children to sue in state court to recover workmen's compensation benefits is not among them.

The relationship of the "legitimate" state interest and "fundamental personal right" analysis to the constitutional guarantee of equal protection of the law is approximately the same as that of "freedom of contract" to the constitutional guarantee that no person shall be deprived of life, liberty, or property without due process of law. It is an invitation for judicial exegesis over and above the commands of the Constitution, in which values that cannot possibly have their source in that instrument are invoked to either validate or condemn the countless laws enacted by the various States. In refusing to accept the breadth of meaning of the Fourteenth Amendment urged upon the Court in the *Slaughter-House Cases,* Mr. Justice Miller said:

> "And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment." 16 Wall., at 78.

Mr. Justice Harlan made clear in his dissent in *Levy* the exclusively statutory basis for wrongful-death actions as a matter of legal history, and the same may be even more emphatically said about claims for workmen's

compensation benefits. In spite of the Court's statement of a test, one part of which requires the determination of the extent to which "fundamental personal rights" might be endangered by the Louisiana classification here, we are nowhere told in the opinion just what "fundamental personal right" it is that is involved, to say nothing of whether it is "endangered." The Court says that, while society has long condemned "irresponsible liaisons beyond the bonds of marriage," nonetheless "visiting this condemnation on the head of an infant is illogical and unjust." A fair-minded man might regard it as both, but the Equal Protection Clause of the Fourteenth Amendment requires neither that state enactments be "logical" nor does it require that they be "just" in the common meaning of those terms. It requires only that there be some conceivable set of facts that may justify the classification involved.

In the instant case I cannot condemn as irrational Louisiana's distinction between legitimate and illegitimate children. In a statutory compensation scheme such as this, the State must inevitably draw rather fine and arbitrary lines. For example, Louisiana declares that parents will have priority in this scheme over first cousins, regardless of the degree of dependency or affection in any given case. Surely, no one would condemn this classification as violative of the Fourteenth Amendment, since it is likely to reflect fairly the unarticulated intent of the decedent. Similarly, the State might rationally presume that the decedent would have preferred the compensation to go to his legitimate children, rather than those illegitimates whom he has not acknowledged.

Although the majority argues that "the state interest in minimizing problems of proof is not *significantly* disturbed by our decision," *ante*, at 175 (emphasis added), it clearly recognizes, as it must, that under its decision

additional and sometimes more difficult problems of proof of paternity and dependency may be raised. This is particularly true with respect to petitioner's youngest child, who was not born until after the death of his father. I believe that a State's desire to lessen these problems under its statutory scheme is a rational basis for difference in treatment of the two classes.

Finally, the majority apparently draws some comfort from the fact that the illegitimate children here could not have been acknowledged, since the decedent remained married to another woman while he raised these children. However, I do not believe that it follows from this fact that the statutory classification is irrational. On the contrary, this element of the statutory scheme points up another possible legislative purpose which I do not believe this Court should so freely dismiss. Louisiana, like many other States, has a wide variety of laws designed to encourage legally recognized and responsible family relationships. I believe this particular statutory provision, forbidding acknowledgment of illegitimate children when the parents were not free to marry (in this case because the father was already married to another woman), might be considered part of that statutory pattern designed to discourage formation of illicit family relationships. Whether this is a wise state policy, and whether this particular statute will be particularly effective in advancing it, are not matters for this Court's determination.

Levy and today's decision are not only inconsistent with the long line of earlier cases construing the Equal Protection Clause to forbid only irrational classifications; they are quite inconsistent with *Dandridge* v. *Williams, supra,* decided two years after *Levy.* If state welfare legislation involving "the most basic economic needs of impoverished human beings" is to be judged by the traditional "reasonable basis" standard, I am at a

loss to see why that standard should not likewise govern legislation determining eligibility for state workmen's compensation benefits.

All legislation involves classification and line drawing of one kind or another. When this Court expands the traditional "reasonable basis" standard for judgment under the Equal Protection Clause into a search for "legitimate" state interests that the legislation may "promote," and "for fundamental personal rights" that it might "endanger," it is doing nothing less than passing policy judgments upon the acts of every state legislature in the country.

VERMONT *v.* NEW YORK ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 50, Orig. Argued February 29, 1972—Decided April 24, 1972

Motion for leave to file bill of complaint granted.

Fred I. Parker, Deputy Attorney General of Vermont, argued the cause for plaintiff. With him on the briefs were *James M. Jeffords,* Attorney General, and *John D. Hansen,* Assistant Attorney General.

Philip Weinberg, Assistant Attorney General of New York, argued the cause for defendant State of New York. With him on the briefs were *Louis J. Lefkowitz,* Attorney General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Paul S. Shemin* and *Irving Galt,* Assistant Attorneys General. *Taggart Whipple* argued the cause for defendant International Paper Co. With him on the briefs were *Richard E. Nolan* and *William H. Levit, Jr.*

PER CURIAM.

The motion by Vermont for leave to file a bill of complaint invoking our original jurisdiction against New York and against International Paper Co., a New York corporation doing business in New York, is granted. New York and International Paper Co. are given until June 19, 1972, to answer the bill of complaint.

So ordered.

Per Curiam

SIXTY-SEVENTH MINNESOTA STATE SENATE *v.* BEENS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 71–1024. Decided April 29, 1972*

A three-judge District Court found that the Minnesota Legislature was malapportioned and reduced the number of legislative districts from 67, the number established in 1913, to 35, thereby reducing the number of senators by almost 50%, and the number of representatives by nearly 25%. The court declared the entire 1966 apportionment act unconstitutional and enjoined state officials from conducting elections thereunder, later modifying that injunction so as to enjoin any future elections under any plan other than the one adopted by the court "or a constitutional plan adopted after this date by the State of Minnesota." Appellant, the Minnesota State Senate, intervened in the apportionment challenge below. *Held:*

1. The appellant had the right to intervene, as the District Court's orders directly affected the senate, which is an appropriate legal entity for the purpose of intervention. *Silver* v. *Jordan,* 241 F. Supp. 576, aff'd, 381 U. S. 415.

2. The District Court's injunction with respect to the statutory sections fixing the number of legislative districts and the number of senators and representatives is sufficient to justify a direct appeal under 28 U. S. C. § 1253.

3. A federal reapportionment court should accommodate the relief ordered to the appropriate provisions of state statutes relating to the legislature's size as far as possible, and the action of the District Court here in so drastically changing the number of districts and the size of the houses of the state legislature is not required by the Federal Constitution and is not justified as an exercise of federal power.

336 F. Supp. 715, vacated and remanded.

PER CURIAM.

These two appeals are taken by the Minnesota State Senate from orders of a three-judge Federal District Court

*Together with No. 71–1145, *Sixty-seventh Minnesota State Senate* v. *Beens et al.,* on appeal from the same court.

reapportioning the Minnesota Legislature. The appeals do not challenge the District Court's conclusion that the legislature is now malapportioned. And at this point they are not concerned with population variances or with other issues of the type customarily presented in reapportionment litigation. The controversy focuses, instead, on (a) the District Court's refusal to honor the Minnesota statute fixing the number of the State's legislative districts at 67 and (b) the court's proceeding, over the initial opposition of all parties (but upon the suggestion of two *amici*, the Lieutenant Governor and a representative), to reduce the number of legislative districts to 35, the number of senators by almost 50%, and the number of representatives by nearly 25%. We conclude that the District Court erred in its rulings. Accordingly, we summarily vacate the court's orders and remand the cases for further proceedings promptly to be pursued.

I

The Minnesota Bicameral Legislature was last effectively apportioned in 1966. Ex. Sess. Laws 1966, c. 1.[1]

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[1] This was the ninth general reapportionment in Minnesota since the adoption of the State's Constitution in 1857. Initially there were 26 districts, 37 senators, and 80 representatives. Minn. Const. 1857, Schedule § 12 (both versions). The succeeding plans, and the number of districts and legislators they specified, were

	Districts	Senators	Representatives
Laws 1860, c. 73	21	21	42
Laws 1866, c. 4	22	22	47
Laws 1871, c. 20	41	41	106
Laws 1881, c. 128	47	47	103
Laws 1889, c. 2	54	54	114
Laws 1897, c. 120	63	63	119
Laws 1913, c. 91	67	67	130
Ex. Sess. Laws 1959, c. 45	67	67	135

By Laws 1917, c. 217, the number of representatives was increased

Section 2.021 of Minn. Stat. (1969), the very first section of the 1966 Act, states that, "until a new apportionment shall have been made," the State's senate shall consist of 67 members and its house of representatives of 135 members.[2] Section 2.031, subd. 1, from the second section of the 1966 Act, prescribes 67 legislative districts for both the senate and the house.[3] Sections 2.041–2.711, inclusive, then delineate these 67 districts.[4] The State's Constitution, Art. IV, § 2, provides a legislator-population minimum ratio (one senator for every 5,000 inhabitants and one representative for every 2,000 inhabitants) and states, "The representation in both houses shall be apportioned equally throughout the different sections of the state, in proportion to the population thereof."

The 1970 federal census took place in due course. The Minnesota Legislature did not produce a reapportionment act during its regular session in 1971. One was passed on October 29, 1971, during the reconvening of an extra session called that year. The lawmakers adjourned *sine die* on October 30. The Governor, however, vetoed the act on November 1 and

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by one (the 65th district), but there was no accompanying general reapportionment.

Throughout this entire period of more than a century, the Minnesota Constitution, Art. IV, § 23, has called for reapportionment at the first legislative session after each federal census. See also *Magraw* v. *Donovan*, 163 F. Supp. 184 (Minn. 1958), and *Honsey* v. *Donovan*, 236 F. Supp. 8 (Minn. 1964).

[2] "2.021 NUMBER OF MEMBERS. For each legislature, until a new apportionment shall have been made, the senate is composed of 67 members and the house of representatives is composed of 135 members."

[3] "2.031 APPORTIONMENT. Subdivision 1. The representatives in the senate and house of representatives are apportioned throughout the state in 67 legislative districts."

[4] Sections 2.041–2.711 were §§ 3–70, inclusive, of the 1966 act.

this 1971 reapportionment endeavor failed to become law.[5] The Governor has not called the legislature to another extra session for more work on reapportionment,[6] and it is not scheduled to meet again in regular session until January 1973. Minn. Const., Art. IV, § 1; Minn. Stat. § 3.01 (1969). The 1972 primary and general elections will take place in the interim. Minn. Stat. §§ 202.02 and 203.02 (1969). Thus, the 1966 statute remains as the State's last effective legislative apportionment.

II

The original plaintiffs, who are among the appellees here, are three qualified voters of the State. By their complaint, filed in April 1971 and asserting jurisdiction under 28 U. S. C. §§ 1343 (3) and (4) and 42 U. S. C. §§ 1983 and 1988, they sought (a) a declaratory judgment that the 1966 Act apportioning the legislature violates the Equal Protection Clause of the Fourteenth Amendment, (b) an injunction restraining the Minnesota Secretary of State and all county auditors from conducting future elections for legislators pursuant to that Act, and (c) reapportionment of the legislature by the federal court itself. The three-judge court was convened. The appellant, the Sixty-seventh Minnesota State Senate, intervened as a party defendant under Fed. Rule Civ. Proc. 24 (a).

The District Court, after hearings and with the assistance of stipulations, issued three significant orders:

A. On November 15, 1971, it made appropriate findings, not challenged here as to their basic provisions,

[5] A legislative reapportionment act is subject to executive veto under Minn. Const., Art. IV, §§ 11 and 12, and Art. V, § 4. *Duxbury v. Donovan*, 272 Minn. 424, 138 N. W. 2d 692 (1965).

[6] Power is vested in the Governor to convene both houses of the legislature "on extraordinary occasions." Minn. Const., Art. V, § 4. This power is also recognized by Art. IV, § 1, of the Constitution.

and declared the 1966 Act in its *entirety*, Minn. Stat. §§ 2.021–2.712 (1969), inclusive, violative of the Federal Constitution, enjoined the Secretary of State and the county auditors from conducting future elections under the Act, and appointed two Special Masters (a third was named later) to aid the court in formulating a new apportionment plan. See 336 F. Supp. 715, 718–719.

B. On December 3 it found "that it best can fulfill its duty of apportioning the Minnesota Legislature in accordance with the Constitution of the United States and with due regard for State policy" by dividing the State into 35 senatorial districts and dividing each senatorial district into three house districts, and ordered that the parties, intervenors, and *amici* could present plans for apportioning the legislature accordingly. In an accompanying memorandum the court said, "The only serious questions . . . are whether we have the authority to change the size of the Legislature; and if so, to what extent." It answered the first of these questions in the affirmative, quoting the following sentence from *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971):

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 402 U. S., at 15.

The court stated that the legislature could not be apportioned into 67 senate districts and 135 house districts without violating either the Federal Constitution or the Minnesota Constitution; that the existing practice of dividing one senate district into three house districts and all others into two cannot be continued without violating the requirements of equal protection; that the greater the population of each district, the more closely

can the one man, one vote standard be met and still give effect to the state policy of adhering to the boundaries of political subdivisions; that state policy with respect to the legislature's size "is difficult to discern"; that the Governor had recommended a reduction in size; that there is merit in having an odd-numbered senate and house where, as in Minnesota, the State has "two strong and rather evenly divided political parties"; that federal constitutional and state policy requirements can best be harmonized by having 35 senate districts and by dividing each senate district into three house districts; that there are persuasive arguments that "positive benefits to the State will accrue by substantially reducing the size of the Senate and moderately reducing the size of the House"; and that "it is not our desire to fix for the future the size of the Senate and the House in Minnesota," for the legislature, if it wishes, may appropriately reapportion. See 336 F. Supp., at 720–721.

C. On January 25, 1972, it entered its "Final Order and Plan of Apportionment" by which it adopted a plan therein described. The court also modified its injunction of November 15 so as to enjoin the state secretary and county auditors from conducting any future elections for the legislature under any plan other than the one adopted by the court "or a constitutional plan adopted after this date by the State of Minnesota." In accord with Minn. Const., Art. IV, § 24, 1972 elections under the new plan for all positions in the senate and house were ordered. 336 F. Supp. 715, 732.

The senate, as intervenor, first appealed from the orders of November 15, 1971, and December 3, 1971 (case No. 71–1024), and then from the order of January 25, 1972 (case No. 71–1145). Both appeals are under 28 U. S. C. § 1253. We denied the senate's motion to expedite the appeals, but granted its motion to consoli-

date them. 405 U. S. 985 (1972). We then granted its application for a temporary stay pending further order of the Court. *Post*, p. 905.

III

The appellees have moved to dismiss. Two grounds are asserted:

A. That the senate lacks authority and standing to prosecute the appeals. It is said that the senate's authorizing resolution does not entitle its counsel to take the appeals; that the resolution relates only to legislative district boundaries and not to their number; that the Office of Senate Counsel speaks only for certain members of the senate and not for the whole; that it is the legislature, and not just the senate, that is the legal entity concerned for purposes of the appeals; and that only the legislature has standing.

The authorizing senate resolution, however, is in broad terms:

> "BE IT RESOLVED, by the Senate of the State of Minnesota, that the Office of Senate Counsel be and it is hereby authorized and directed to take such steps as may be necessary to represent the interests and will of this body to the extent deemed necessary in both state and federal court actions involving the prescription of the bounds of senatorial and representative districts, the apportionment of senators and representatives among those districts, and the orderly process of elections therefrom . . . ." Journal of the Minnesota Senate 1971, 39th Day, p. 460.

The resolution was adopted July 31, 1971, by a 56-to-0 vote. A motion to reconsider made two and a half months later failed by a vote of 33–31. *Id.*, 40th day, at 492.

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We are not inclined to read this authorizing resolution restrictively, as the appellees suggest. Certainly the present appeals are in a federal court action that concerns apportionment "and the orderly process of elections therefrom." And certainly the senate is directly affected by the District Court's orders. That the senate is an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal in a case of this kind is settled by our affirmance of *Silver* v. *Jordan*, 241 F. Supp. 576 (SD Cal. 1964), aff'd, 381 U. S. 415 (1965), where it was said:

> "The California State Senate's motion to intervene as a substantially interested party was granted because it would be directly affected by the decree of this court." 241 F. Supp., at 579.

A group of senators thus had the right to intervene. The concurrence of the house was not necessary as it would have been to enact legislation.

B. That the appeals are not from orders granting or denying injunctive relief, within the requirement of 28 U. S. C. § 1253. Although the orders of November 15, 1971, and January 25, 1972, specifically enjoin state and county officers, the appellees assert that the restraining portions of those orders are not now attacked and are conceded by the appellant. This, in our view, is too narrow an analysis. The order of November 15 clearly enjoins the state and county officers "from holding or conducting any future elections under the present Apportionment Statutes." That of January 25 does the same except with respect to the plan then adopted by the court or one thereafter validly adopted by the State. The court's injunctive holding applies to §§ 2.031 and 2.021, respectively fixing the number of legislative districts and the number of senators and representatives, as well as to the succeeding sections determining the

boundaries of the 67 districts. The appellant's appeal relates to §§ 2.031 and 2.021. The court's injunction with respect to those sections is sufficient to justify a direct appeal under § 1253. *Gunn* v. *University Committee,* 399 U. S. 383 (1970), cited by the appellees, is inapposite.

IV

That the three-judge federal court possesses the power to reapportion the State's legislature when the applicable state statutes fall short of constitutional requirements is not questioned. *Reynolds* v. *Sims,* 377 U. S. 533, 586–587 (1964). The 1966 Minnesota apportionment legislation, the court found, in the light of the 1970 census figures no longer provided a constitutionally acceptable apportionment of either house. No one challenges that basic finding here, and we have no reason to rule otherwise. The 1971 legislature had endeavored to reapportion and, thus, to fulfill the requirement imposed upon it by Art. IV, § 23, of the State's Constitution.[7] See *Magraw* v. *Donovan,* 163 F. Supp. 184, 187–188 (Minn. 1958), and *Honsey* v. *Donovan,* 236 F. Supp. 8 (Minn. 1964). The legislature's efforts in that direction, however, were nullified by the Governor's veto of the Act it passed, an action the executive had the power to take. *Duxbury* v. *Donovan,* 272 Minn. 424, 138 N. W. 2d 692 (1965). The net result was the continuing applicability of the 1966 act. Under these circumstances judicial relief was appropriate.

[7] Art. IV, § 23. "The legislature shall have the power to provide by law for an enumeration of the inhabitants of this State, and also have the power at their first session after each enumeration of the inhabitants of this state made by the authority of the United States, to prescribe the bounds of congressional, senatorial and representative districts, and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article."

The three-judge court, however, was not content with devising judicial apportionment within the framework of the existing and otherwise valid statutory structure. Instead of recognizing the provision in Minn. Stat. § 2.021 (1969), that the state senate "is composed of 67 members and the house of representatives is composed of 135 members," and the further provision in § 2.031 that the senators and representatives "are apportioned throughout the state in 67 legislative districts," the court declared those sections invalid along with §§ 2.041–2.711, the provisions that delineate the boundaries of the specified 67 legislative districts.

We need not review at length the several pronouncements of this Court relating to state legislative reapportionment. The pertinent cases, particularly those of June 15, 1964, and the guidelines they provide are well-known. It suffices to note that in *Reynolds* v. *Sims*, 377 U. S. 533, the Court stated that apportionment "is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites . . . ." 377 U. S., at 586.[8] But we also stated, "With respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions," and, then, "Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." 377 U. S., at 584. And the Minnesota Constitution, Art. IV, § 23, vests the legislature with power to reapportion.

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[8] In the companion case of *Maryland Committee* v. *Tawes*, 377 U. S. 656, 676, the Court observed again that "primary responsibility for legislative apportionment rests with the legislature itself."

It follows from this that a federal reapportionment court should accommodate the relief ordered to the appropriate provisions of state statutes relating to the legislature's size insofar as is possible. We do not have difficulty, as the District Court professed to have, in discerning the State's policy as to the legislature's size. That policy, long in effect in Minnesota and restated no longer than six years ago in § 2.021, is for 67 senators and 135 representatives, and, in § 2.031, is for 67 legislative districts. These are figures that have been determined by the legislature and approved by the Governor of the State. The present Governor's contrary recommendation, although certainly entitled to thoughtful consideration, represents only the executive's proffered current policy, just as the reapportionment plan he vetoed on November 1, 1971, represented only the legislature's proffered current policy.

We note, in repetition, that the District Court invalidated the entire 1966 Act, §§ 2.021–2.712, despite the fact that the details of the legislative districts' configurations are included only in §§ 2.041–2.711. Section 2.021 merely specifies the number of senators and representatives; § 2.031 calls for the apportionment of those legislators throughout the State in 67 districts; and § 2.712 provided the effective date of the 1966 act, the efficacy of which, for the period prior to the 1970 census, is not at issue here. In the light of the State's policy of statutory severability, Minn. Stat. § 645.20 (1969),[9]

[9] "645.20 CONSTRUCTION OF SEVERABLE PROVISIONS. Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds

and recognizing that this specific number of legislative districts has been in effect in Minnesota since 1913 and through two succeeding reapportionments, we necessarily conclude that the District Court's invalidation of the six-year-old reapportionment law swept too broadly in nullifying statutory sections that are capable of standing alone.

We know of no federal constitutional principle or requirement that authorizes a federal reapportioning court to go as far as the District Court did and, thus, to bypass the State's formal judgment as to the proper size of its legislative bodies. No case decided by this Court has gone that far and we have found no district court decision that has employed such radical surgery in reapportionment. There are cases where judicial reapportionment has effectuated minor changes in a legislature's size. Nearly all those cases reflect an increase or decrease of only a few seats [10] and most appear to have been justified

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the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent."

The 1966 act did not state that its provisions shall not be severable. In contrast, Minnesota's immediately preceding apportionment act, Ex. Sess. Laws 1959, c. 45, did contain in its § 72 an express nonseverability provision; that provision was repealed by c. 1, § 71, of the 1966 act. The legislative intent in 1966 is thus apparent.

[10] *Sims* v. *Amos*, 336 F. Supp. 924, 936, 937 (MD Ala. 1972) (house reduced from 106 to 105 so as to have three times the number of senate seats); *Schaefer* v. *Thomson*, 251 F. Supp. 450 (Wyo. 1965), aff'd, 383 U. S. 269 (1966) (senate increased from 25 to 30 on agreement of the parties and in accord with the state constitution); *Klahr* v. *Goddard*, 250 F. Supp. 537 (Ariz. 1966) (senate reduced from 31 to 30 and house from 80 to 60. The preservation of county lines, as prescribed by the State's constitution, Art. 4, pt. 2, § 1, was an announced consideration in this substantial house reduction which no one opposed. No appeal was taken); *Herweg* v. *Thirty Ninth Legislative Assembly*, 246 F. Supp. 454 (Mont. 1965) (senate reduced from 56 to 55 and house increased from 94

by a state constitutional demand, agreement of the parties, the observance of geographical boundaries, or mathematical convenience. We do not disapprove a court-imposed minor variation from a State's prescribed figure when that change is shown to be necessary to meet constitutional requirements. And we would not oppose the District Court's reducing, in this case, the number of representatives in the Minnesota house from 135 to 134, as the parties apparently have been willing to concede. That action would fit exactly the 67-district pattern. But to slash a state senate's size almost in half and a state house's size by nearly one-fourth is to make more than a mere minor variation. If a change of that extent were acceptable, so, too, would be a federal court's cutting or increasing size by 75% or 90% or, indeed, by prescribing a unicameral legislature for a State that has always followed the bicameral precedent. We repeat what was said recently in another legislative apportionment case: "The remedial powers of an equity court must be adequate to the task, but they are not unlimited." *Whitcomb* v. *Chavis*, 403 U. S. 124, 161 (1971).

In summary, the number of a State's legislative districts or the number of members in each house of its legislature raises no issue of equal protection unless the

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to 104. A constitutional provision, Art. VI, § 3, prohibiting the division of counties, was thereby observed); *Paulson* v. *Meier*, 246 F. Supp. 36 (ND 1965) (senate reduced from 53 to 49 and house from 106 to 98. The State's constitution, Art. II, § 26, mandated a senate of 49 members).

In other cases federal courts have altered the size of existing legislatures by approximating the number of legislators specified in new plans that the courts were nullifying. *Swann* v. *Adams*, 263 F. Supp. 225 (SD Fla. 1967); *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 (SDNY 1965), aff'd, 382 U. S. 4 (1965). The state policy thus has been effectuated despite the invalidity of the legislature's proposed plan.

number so prescribed occasions significant and invalidating population deviations.

> "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." *Reynolds* v. *Sims*, 377 U. S., at 581 n. 63.

See also *Connor* v. *Johnson*, 330 F. Supp. 506, 507 (SD Miss.), order stayed on other grounds, 402 U. S. 690, opinion on remand, 330 F. Supp. 521 (SD Miss. 1971); *Bannister* v. *Davis*, 263 F. Supp. 202, 208 (ED La. 1966); *Dungan* v. *Sawyer*, 250 F. Supp. 480, 489 (Nev. 1965).

We conclude that the action of the three-judge court in so drastically changing the number of legislative districts and the size of the respective houses of the Minnesota Legislature is not required by the Federal Constitution and is not justified as an exercise of federal judicial power.

Our ruling here, of course, is no expression of opinion on our part as to what is desirable by way of legislative size for the State of Minnesota or for any other State. It may well be that 67 senators and 135 representatives make a legislature of unwieldy size. That is a matter of state policy. We certainly are not equipped—and it is not our function and task—to effectuate policy of that kind or to evaluate it once it has been determined by the State. Neither is it the function and task of the Federal District Court. Size is for the State to determine in the exercise of its wisdom and in the light of its awareness of the needs and desires of its people.

The orders of the District Court are vacated and the cases are remanded for further proceedings consistent

with this opinion. The District Court is instructed to give this matter priority and to act promptly and forthwith so that the State's 1972 electoral process may get under way with assurance as soon as possible. It is already late in the day, but the maintenance of legislative districts long in effect provides a minimum of disruption even now.[11]

The judgment in these cases shall issue forthwith.

It is so ordered.

MR. JUSTICE STEWART, dissenting.

It is undisputed here that the apportionment of the Minnesota State Legislature violated the Equal Protection Clause of the Fourteenth Amendment. Thus, it was incumbent upon the three-judge federal court to devise a constitutional reapportionment, unless and until the Minnesota Legislature and Governor could agree upon and enact a new and constitutional reapportionment of their own. The only question presented by these appeals is whether the three-judge court abused its equitable discretion by devising the reapportionment plan that it did—a plan that called for a reduction in the size of both houses of the state legislature.

There is no doubt that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and

[11] The 1972 general election in Minnesota will take place November 7. The primaries are scheduled for September 12. Candidates may file between July 5 and July 18. A legislative candidate must establish residence in his district by May 7. Minn. Stat. §§ 203.02, 202.02, 202.04; Minn. Const., Art. IV, § 25. Inasmuch as the Minnesota Legislature is nonpartisan, Minn. Stat. § 202.03, subd. 1, the earlier dates for political party precinct caucuses and party conventions have no relevance in these cases. If time presses too seriously, the District Court has the power appropriately to extend the time limitations imposed by state law. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).

flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15. At the same time "[t]he remedial powers of an equity court . . . are not unlimited." *Whitcomb* v. *Chavis*, 403 U. S. 124, 161. In the reapportionment context, it is the duty of a court seeking to remedy an unconstitutional apportionment to right the constitutional wrong while minimizing disturbance of legitimate state policies.

In these cases, the three-judge court appears conscientiously to have undertaken this task. It clearly recognized that the size of the houses of the Minnesota Legislature set by state statute was a state policy deserving respect. But it also recognized that there were several other legitimate state policies at stake—for one, the conformance of legislative district boundaries to political jurisdictional boundaries. The three-judge court also found that these policies were, unfortunately, in conflict. It stated:

> "The larger the population of each Senate and House District, the more closely can the equal protection (one man-one vote) requirements be met and still give effect to the State policy of adhering to the boundaries of political subdivisions. Conversely, the smaller the population of each district, the greater the likelihood that the deviations will be higher than are acceptable or that artificial boundaries will result."

Faced with this perceived conflict among legitimate state policies, the three-judge court weighed those policies and decided that preservation of political jurisdictional boundaries should take precedence over preservation of the present size of the senate and the house.[1]

[1] The court also was careful to recognize another state policy—that there should be an odd number of legislators in each house so as to minimize the risk of tie votes.

Perhaps the three-judge court's assessment of the relative weights of what it saw as competing state policies was mistaken. Perhaps its accommodation of those policies was also mistaken. But those judgments by the three-judge court were based on long and careful study of the distribution of population in Minnesota and of the possible alternative apportionments of the legislature.

This Court chooses to act on these appeals summarily. Yet we do not have before us all the population statistics and jurisdictional and district maps that were before the three-judge court. We do not have the benefit of the reports of the Special Masters that were available to the three-judge court. We do not even have briefs on the merits of these cases. And, of course, we have not heard oral arguments. For these and other reasons we are simply not able at this point even to begin to evaluate the three-judge court's exercise of its remedial power in equity.

Surely, if state policies are in real conflict and if, as the three-judge court found, equal protection requirements cannot be met without sacrificing one of these policies, then the cases are very difficult. I certainly cannot say, on the basis of the information before us, that the three-judge court clearly overstepped its equitable discretion in its resolution of the problem. As the Court recognizes today, there is no rigid and absolute limit on a court's equitable discretion to order changes in the size of legislative bodies in order to remedy an unconstitutional apportionment. Every case is different, and these questions are inevitably questions of degree.

I have disagreed with the Court's Procrustean view of the Fourteenth Amendment's substantive requirement of "one man, one vote." [2] But until and unless those estab-

[2] See, *e. g.*, *Lucas* v. *Colorado Gen. Assembly*, 377 U. S. 713, 744; *Swann* v. *Adams*, 385 U. S. 440, 447. See also *Wells* v. *Rockefeller*, 394 U. S. 542, 549.

lished requirements are modified, the federal courts are often going to be faced with hard remedial problems such as those presented here. Difficult problems produce solutions that are difficult to review, even after full briefing and oral argument. I cannot believe that summary action here is either wise or appropriate, and I therefore respectfully dissent.

Syllabus

WISCONSIN *v.* YODER ET AL.

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 70–110. Argued December 8, 1971—Decided May 15, 1972

Respondents, members of the Old Order Amish religion and the Conservative Amish Mennonite Church, were convicted of violating Wisconsin's compulsory school-attendance law (which requires a child's school attendance until age 16) by declining to send their children to public or private school after they had graduated from the eighth grade. The evidence showed that the Amish provide continuing informal vocational education to their children designed to prepare them for life in the rural Amish community. The evidence also showed that respondents sincerely believed that high school attendance was contrary to the Amish religion and way of life and that they would endanger their own salvation and that of their children by complying with the law. The State Supreme Court sustained respondents' claim that application of the compulsory school-attendance law to them violated their rights under the Free Exercise Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. *Held:*

1. The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children. Pp. 213–215.

2. Respondents have amply supported their claim that enforcement of the compulsory formal education requirement after the eighth grade would gravely endanger if not destroy the free exercise of their religious beliefs. Pp. 215–219.

3. Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continuing survival of Old Order Amish communities, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have

carried the difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of the overall interests that the State relies on in support of its program of compulsory high school education. In light of this showing, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Pp. 219–229, 234–236.

4. The State's claim that it is empowered, as *parens patriae*, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a free exercise claim of the nature revealed by this record, for the Amish have introduced convincing evidence that accommodating their religious objections by forgoing one or two additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society. Pp. 229–234.

49 Wis. 2d 430, 182 N. W. 2d 539, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 237. WHITE, J., filed a concurring opinion, in which BRENNAN and STEWART, JJ., joined, *post*, p. 237. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 241. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

John W. Calhoun, Assistant Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs were *Robert W. Warren*, Attorney General, and *William H. Wilker*, Assistant Attorney General.

William B. Ball argued the cause for respondents. With him on the brief was *Joseph G. Skelly*.

Briefs of *amici curiae* urging affirmance were filed by *Donald E. Showalter* for the Mennonite Central Com-

mittee; by *Boardman Noland* and *Lee Boothby* for the General Conference of Seventh-Day Adventists; by *William S. Ellis* for the National Council of the Churches of Christ; by *Nathan Lewin* for the National Jewish Commission on Law and Public Affairs; and by *Leo Pfeffer* for the Synagogue Council of America et al.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions of violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade.[1] The children were not enrolled in any private school, or within any recognized exception to the compulsory-attendance law,[2] and they are conceded to be subject to the Wisconsin statute.

[1] The children, Frieda Yoder, aged 15, Barbara Miller, aged 15, and Vernon Yutzy, aged 14, were all graduates of the eighth grade of public school.

[2] Wis. Stat. § 118.15 (1969) provides in pertinent part:

"118.15 *Compulsory school attendance*

"(1)(a) Unless the child has a legal excuse or has graduated from

On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory-attendance law in Green County Court and were fined the sum of $5 each.[3] Respondents defended on the ground that the applica-

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high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.

. . . . . .

"(3) This section does not apply to any child who is not in proper physical or mental condition to attend school, to any child exempted for good cause by the school board of the district in which the child resides or to any child who has completed the full 4-year high school course. The certificate of a reputable physician in general practice shall be sufficient proof that a child is unable to attend school.

"(4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.

"(5) Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both."

Section 118.15 (1)(b) requires attendance to age 18 in a school district containing a "vocational, technical and adult education school," but this section is concededly inapplicable in this case, for there is no such school in the district involved.

[3] Prior to trial, the attorney for respondents wrote the State Superintendent of Public Instruction in an effort to explore the possibilities for a compromise settlement. Among other possibilities, he suggested that perhaps the State Superintendent could administratively determine that the Amish could satisfy the compulsory-attendance law by establishing their own vocational training plan similar to one that has been established in Pennsylvania. Supp. App. 6. Under the Pennsylvania plan, Amish children of high school age are required to attend an Amish vocational school for

tion of the compulsory-attendance law violated their rights under the First and Fourteenth Amendments.[4] The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

In support of their position, respondents presented as expert witnesses scholars on religion and education whose testimony is uncontradicted. They expressed their opinions on the relationship of the Amish belief concerning school attendance to the more general tenets of their religion, and described the impact that compulsory high school attendance could have on the continued survival of Amish communities as they exist in the United States today. The history of the Amish

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three hours a week, during which time they are taught such subjects as English, mathematics, health, and social studies by an Amish teacher. For the balance of the week, the children perform farm and household duties under parental supervision, and keep a journal of their daily activities. The major portion of the curriculum is home projects in agriculture and homemaking. See generally J. Hostetler & G. Huntington, Children in Amish Society: Socialization and Community Education, c. 5 (1971). A similar program has been instituted in Indiana. *Ibid.* See also Iowa Code § 299.24 (1971); Kan. Stat. Ann. § 72-1111 (Supp. 1971).

The Superintendent rejected this proposal on the ground that it would not afford Amish children "substantially equivalent education" to that offered in the schools of the area. Supp. App. 6.

[4] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

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sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung*, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.[5]

Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts. They object to the high school, and higher education generally, because the values they teach

[5] See generally J. Hostetler, Amish Society (1968); J. Hostetler & G. Huntington, Children in Amish Society (1971); Littell, Sectarian Protestantism and the Pursuit of Wisdom: Must Technological Objectives Prevail?, in Public Controls for Nonpublic Schools 61 (D. Erickson ed. 1969).

are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. They must learn to enjoy physical labor. Once a child has learned basic reading, writing, and elementary mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing" rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance with teachers who are not of the Amish faith—and may even be hostile to it—interposes a serious barrier to the integration of the Amish child into

the Amish religious community. Dr. John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society.

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God.

On the basis of such considerations, Dr. Hostetler testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today. The testimony of Dr. Donald A. Erickson, an expert witness on education, also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. He described their system of learning through doing the skills directly relevant to their adult roles in the Amish community as "ideal" and perhaps superior to ordinary high school education. The evidence also showed that the Amish have an excellent

record as law-abiding and generally self-sufficient members of society.

Although the trial court in its careful findings determined that the Wisconsin compulsory school-attendance law "does interfere with the freedom of the Defendants to act in accordance with their sincere religious belief" it also concluded that the requirement of high school attendance until age 16 was a "reasonable and constitutional" exercise of governmental power, and therefore denied the motion to dismiss the charges. The Wisconsin Circuit Court affirmed the convictions. The Wisconsin Supreme Court, however, sustained respondents' claim under the Free Exercise Clause of the First Amendment and reversed the convictions. A majority of the court was of the opinion that the State had failed to make an adequate showing that its interest in "establishing and maintaining an educational system overrides the defendants' right to the free exercise of their religion." 49 Wis. 2d 430, 447, 182 N. W. 2d 539, 547 (1971).

I

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. See, *e. g., Pierce* v. *Society of Sisters,* 268 U. S. 510, 534 (1925). Providing public schools ranks at the very apex of the function of a State. Yet even this paramount responsibility was, in *Pierce,* made to yield to the right of parents to provide an equivalent education in a privately operated system. There the Court held that Oregon's statute compelling attendance in a public school from age eight to age 16 unreasonably interfered with the interest of parents in directing the rearing of their offspring, including their education in church-operated schools. As that case suggests, the values of parental direction of the religious upbringing

and education of their children in their early and formative years have a high place in our society. See also *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); cf. *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970). Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations." 268 U. S., at 535.

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. The invalidation of financial aid to parochial schools by government grants for a salary subsidy for teachers is but one example of the extent to which courts have gone in this regard, notwithstanding that such aid programs were legislatively determined to be in the public interest and the service of sound educational policy by States and by Congress. *Lemon* v.

Kurtzman, 403 U. S. 602 (1971); *Tilton* v. *Richardson,* 403 U. S. 672 (1971). See also *Everson* v. *Board of Education,* 330 U. S. 1, 18 (1947).

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. *E. g., Sherbert* v. *Verner,* 374 U. S. 398 (1963); *McGowan* v. *Maryland,* 366 U. S. 420, 459 (1961) (separate opinion of Frankfurter, J.); *Prince* v. *Massachusetts,* 321 U. S. 158, 165 (1944).

II

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question,[6] the very concept of ordered liberty precludes

[6] See *Welsh* v. *United States,* 398 U. S. 333, 351–361 (1970) (Harlan, J., concurring in result); *United States* v. *Ballard,* 322 U. S. 78 (1944).

allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world . . . ." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education.[7] The re-

[7] See generally R. Butts & L. Cremin, A History of Education in American Culture (1953); L. Cremin, The Transformation of the School (1961).

spondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards. So long as compulsory education laws were confined to eight grades of elementary basic education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to the worldly influence they reject. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record so strongly shows, the values and programs of the modern secondary school are in sharp conflict with the fundamental mode of life mandated by the Amish religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict.[8]

[8] Hostetler, *supra*, n. 5, c. 9; Hostetler & Huntington, *supra*, n. 5.

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. See *Braunfeld* v. *Brown*, 366 U. S. 599, 605 (1961). Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.[9]

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[9] Some States have developed working arrangements with the Amish regarding high school attendance. See n. 3, *supra*. However, the danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat of criminal prosecution. Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses. See, *e. g.*, *Everson* v. *Board of Education*, 330 U. S. 1, 9–10 (1947); Madison, Memorial and Remonstrance Against

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

III

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment.[10] But our decisions have rejected the idea that

Religious Assessments, 2 Writings of James Madison 183 (G. Hunt ed. 1901).

[10] That has been the apparent ground for decision in several previous state cases rejecting claims for exemption similar to that here. See, *e. g.*, *State* v. *Garber*, 197 Kan. 567, 419 P. 2d 896 (1966), cert. denied, 389 U. S. 51 (1967); *State* v. *Hershberger*, 103 Ohio App. 188, 144 N. E. 2d 693 (1955); *Commonwealth* v. *Beiler*, 168 Pa. Super. 462, 79 A. 2d 134 (1951).

religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, *e. g., Gillette* v. *United States,* 401 U. S. 437 (1971); *Braunfeld* v. *Brown,* 366 U. S. 599 (1961); *Prince* v. *Massachusetts,* 321 U. S. 158 (1944); *Reynolds* v. *United States,* 98 U. S. 145 (1879). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. *E. g., Sherbert* v. *Verner,* 374 U. S. 398 (1963); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304 (1940). This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. Cf. *Lemon* v. *Kurtzman,* 403 U. S., at 612.

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Sherbert* v. *Verner, supra;* cf. *Walz* v. *Tax Commission,* 397 U. S. 664 (1970). The Court must not ignore the danger that an exception

from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses

> "we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed." *Walz* v. *Tax Commission, supra,* at 672.

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption. See, *e. g., Sherbert* v. *Verner, supra; Martin* v. *City of Struthers,* 319 U. S. 141 (1943); *Schneider* v. *State,* 308 U. S. 147 (1939).

The State advances two primary arguments in support of its system of compulsory education. It notes, as Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. See *Meyer* v. *Nebraska*, 262 U. S., at 400.

The State attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.[11]

[11] Title 26 U. S. C. § 1402 (h) authorizes the Secretary of Health, Education, and Welfare to exempt members of "a recognized religious sect" existing at all times since December 31, 1950, from the obligation to pay social security taxes if they are, by reason of the tenets of their sect, opposed to receipt of such benefits and agree

It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. What this record shows is that they are opposed to conventional formal education of the type provided by a certified high school because it comes at the child's crucial adolescent period of religious development. Dr. Donald Erickson, for example, testified that their system of learning-by-doing was an "ideal system" of education in terms of preparing Amish children for life as adults in the Amish community, and that "I would be inclined to say they do a better job in this than most of the rest of us do." As he put it, "These people aren't purporting to be learned people, and it seems to me the self-sufficiency of the community is the best evidence I can point to—whatever is being done seems to function well." [12]

We must not forget that in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is

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to waive them, provided the Secretary finds that the sect makes reasonable provision for its dependent members. The history of the exemption shows it was enacted with the situation of the Old Order Amish specifically in view. H. R. Rep. No. 213, 89th Cong., 1st Sess., 101–102 (1965).

The record in this case establishes without contradiction that the Green County Amish had never been known to commit crimes, that none had been known to receive public assistance, and that none were unemployed.

[12] Dr. Erickson had previously written: "Many public educators would be elated if their programs were as successful in preparing students for productive community life as the Amish system seems to be. In fact, while some public schoolmen strive to outlaw the Amish approach, others are being forced to emulate many of its features." Erickson, Showdown at an Amish Schoolhouse: A Description and Analysis of the Iowa Controversy, in Public Controls for Nonpublic Schools 15, 53 (D. Erickson ed. 1969). And see Littell, *supra*, n. 5, at 61.

"right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some such children will choose to leave the Amish community, and that if this occurs they will be ill-equipped for life. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society because of educational shortcomings. Indeed, this argument of the State appears to rest primarily on the State's mistaken assumption, already noted, that the Amish do not provide any education for their children beyond the eighth grade, but allow them to grow in "ignorance." To the contrary, not only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an "ideal" vocational education for their children in the adolescent years.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the

State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.[13] When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the

[13] All of the children involved in this case are graduates of the eighth grade. In the county court, the defense introduced a study by Dr. Hostetler indicating that Amish children in the eighth grade achieved comparably to non-Amish children in the basic skills. Supp. App. 9–11. See generally Hostetler & Huntington, *supra*, n. 5, at 88–96.

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ideal of a democratic society.[14] Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.

The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed.[15] The inde-

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[14] While Jefferson recognized that education was essential to the welfare and liberty of the people, he was reluctant to directly force instruction of children "in opposition to the will of the parent." Instead he proposed that state citizenship be conditioned on the ability to "read readily in some tongue, native or acquired." Letter from Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, in 17 Writings of Thomas Jefferson 417, 423–424 (Mem. ed. 1904). And it is clear that, so far as the mass of the people were concerned, he envisaged that a basic education in the "three R's" would sufficiently meet the interests of the State. He suggested that after completion of elementary school, "those destined for labor will engage in the business of agriculture, or enter into apprenticeships to such handicraft art as may be their choice." Letter from Thomas Jefferson to Peter Carr, Sept. 7, 1814, in Thomas Jefferson and Education in a Republic 93–106 (Arrowood ed. 1930). See also *id.*, at 60–64, 70, 83, 136–137.

[15] See Dept. of Interior, Bureau of Education, Bulletin No. 47, Digest of State Laws Relating to Public Education 527–559 (1916); Joint Hearings on S. 2475 and H. R. 7200 before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., pt. 2, p. 416.

Even today, an eighth grade education fully satisfies the educational requirements of at least six States. See Ariz. Rev. Stat. Ann. § 15–321 (B)(4) (1956); Ark. Stat. Ann. § 80–1504 (1947); Iowa Code § 299.2 (1971); S. D. Comp. Laws Ann. § 13–27–1 (1967); Wyo. Stat. Ann. § 21.1–48 (Supp. 1971). (Mississippi has no compulsory education law.) A number of other States have flexible provisions permitting children aged 14 or having completed the eighth grade to be excused from school in order to engage in lawful employment. *E. g.*, Colo. Rev. Stat. Ann. §§ 123–20–5, 80–6–1 to 80–6–12

pendence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country are strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail.

We should also note that compulsory education and child labor laws find their historical origin in common humanitarian instincts, and that the age limits of both laws have been coordinated to achieve their related objectives.[16] In the context of this case, such considera-

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(1963); Conn. Gen. Stat. Rev. §§ 10–184, 10–189 (1964); D. C. Code Ann. §§ 31–202, 36–201 to 36–228 (1967); Ind. Ann. Stat. §§ 28–505 to 28–506, 28–519 (1948); Mass. Gen. Laws Ann., c. 76, § 1 (Supp. 1972) and c. 149, § 86 (1971); Mo. Rev. Stat. §§ 167.031, 294.051 (1969); Nev. Rev. Stat. § 392.110 (1968); N. M. Stat. Ann. § 77–10–6 (1968).

An eighth grade education satisfied Wisconsin's formal education requirements until 1933. See Wis. Laws 1927, c. 425, § 97; Laws 1933, c. 143. (Prior to 1933, provision was made for attendance at continuation or vocational schools by working children past the eighth grade, but only if one was maintained by the community in question.) For a general discussion of the early development of Wisconsin's compulsory education and child labor laws, see F. Ensign, Compulsory School Attendance and Child Labor 203–230 (1921).

[16] See, *e. g.*, Joint Hearings, *supra*, n. 15, pt. 1, at 185–187 (statement of Frances Perkins, Secretary of Labor), pt. 2, at 381–387 (statement of Katherine Lenroot, Chief, Children's Bureau, Department of Labor); National Child Labor Committee, 40th Anniversary Report, The Long Road (1944); 1 G. Abbott, The Child and the State 259–269, 566 (Greenwood reprint 1968); L. Cremin, The Transformation of the School, c. 3 (1961); A. Steinhilber & C. Sokolowski, State Law on Compulsory Attendance 3–4 (Dept. of Health, Education, and Welfare 1966).

tions, if anything, support rather than detract from respondents' position. The origins of the requirement for school attendance to age 16, an age falling after the completion of elementary school but before completion of high school, are not entirely clear. But to some extent such laws reflected the movement to prohibit most child labor under age 16 that culminated in the provisions of the Federal Fair Labor Standards Act of 1938.[17] It is true, then, that the 16-year child labor age limit may to some degree derive from a contemporary impression that children should be in school until that age. But at the same time, it cannot be denied that, conversely, the 16-year education limit reflects, in substantial measure, the concern that children under that age not be employed under conditions hazardous to their health, or in work that should be performed by adults.

The requirement of compulsory schooling to age 16 must therefore be viewed as aimed not merely at providing educational opportunities for children, but as an alternative to the equally undesirable consequence of unhealthful child labor displacing adult workers, or, on the other hand, forced idleness.[18] The two kinds of statutes—compulsory school attendance and child labor laws—tend to keep children of certain ages off the labor market and in school; this regimen in turn provides opportunity to prepare for a livelihood of a higher order than that which children could pursue without education and protects their health in adolescence.

In these terms, Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attend-

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[17] 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219.

[18] See materials cited n. 16, *supra;* Casad, Compulsory Education and Individual Rights, in 5 Religion and the Public Order 51, 82 (D. Giannella ed. 1969).

ance for children generally. For, while agricultural employment is not totally outside the legitimate concerns of the child labor laws, employment of children under parental guidance and on the family farm from age 14 to age 16 is an ancient tradition that lies at the periphery of the objectives of such laws.[19] There is no intimation that the Amish employment of their children on family farms is in any way deleterious to their health or that Amish parents exploit children at tender years. Any such inference would be contrary to the record before us. Moreover, employment of Amish children on the family farm does not present the undesirable economic aspects of eliminating jobs that might otherwise be held by adults.

IV

Finally, the State, on authority of *Prince* v. *Massachusetts,* argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents. Taken at its broadest sweep, the Court's language in *Prince,* might be read to give support to the State's position. However, the Court was not confronted in *Prince* with a situation comparable to that of the Amish as revealed in this record; this is shown by the

[19] See, *e. g.,* Abbott, *supra,* n. 16, at 266. The Federal Fair Labor Standards Act of 1938 excludes from its definition of "[o]ppressive child labor" employment of a child under age 16 by "a parent . . . employing his own child . . . in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being." 29 U. S. C. § 203 (*l*).

Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult. 321 U. S., at 169–170. The Court later took great care to confine *Prince* to a narrow scope in *Sherbert* v. *Verner*, when it stated:

> "On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' *Braunfeld* v. *Brown*, 366 U. S. 599, 603. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, *e. g.*, *Reynolds* v. *United States*, 98 U. S. 145; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Prince* v. *Massachusetts*, 321 U. S. 158 . . . ." 374 U. S., at 402–403.

This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.[20] The record is to the contrary, and any reliance on that theory would find no support in the evidence.

Contrary to the suggestion of the dissenting opinion of MR. JUSTICE DOUGLAS, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it

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[20] Cf. *e. g.*, *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905); *Wright* v. *DeWitt School District*, 238 Ark. 906, 385 S. W. 2d 644 (1965); *Application of President and Directors of Georgetown College, Inc.*, 118 U. S. App. D. C. 80, 87–90, 331 F. 2d 1000, 1007–1010 (in-chambers opinion), cert. denied, 377 U. S. 978 (1964).

is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent. The dissent argues that a child who expresses a desire to attend public high school in conflict with the wishes of his parents should not be prevented from doing so. There is no reason for the Court to consider that point since it is not an issue in the case. The children are not parties to this litigation. The State has at no point tried this case on the theory that respondents were preventing their children from attending school against their expressed desires, and indeed the record is to the contrary.[21] The State's position from the outset has been that it is empowered to apply its compulsory-attendance law to Amish parents in the same manner as to other parents—that is, without regard to the wishes of the child. That is the claim we reject today.

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here

[21] The only relevant testimony in the record is to the effect that the wishes of the one child who testified corresponded with those of her parents. Testimony of Frieda Yoder, Tr. 92–94, to the effect that her personal religious beliefs guided her decision to discontinue school attendance after the eighth grade. The other children were not called by either side.

and those presented in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). On this record we neither reach nor decide those issues.

The State's argument proceeds without reliance on any actual conflict between the wishes of parents and children. It appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world. The same argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14–16 if they are placed in a church school of the parents' faith.

Indeed it seems clear that if the State is empowered, as *parens patriae,* to "save" a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child. Even more markedly than in *Prince,* therefore, this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce* v. *Society of Sisters,* in which the Court observed:

> "Under the doctrine of *Meyer* v. *Nebraska,* 262 U. S. 390, we think it entirely plain that the Act

> of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S., at 534–535.

The duty to prepare the child for "additional obligations," referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship. *Pierce,* of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince*

if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the Amish have introduced persuasive evidence undermining the arguments the State has advanced to support its claims in terms of the welfare of the child and society as a whole. The record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

In the face of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a *parens patriae* claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State.

V

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.[22] Our disposition of this case, however, in no way

[22] What we have said should meet the suggestion that the decision of the Wisconsin Supreme Court recognizing an exemption for the Amish from the State's system of compulsory education constituted an impermissible establishment of religion. In *Walz* v. *Tax Commission*, the Court saw the three main concerns against which the Establishment Clause sought to protect as "sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U. S. 664, 668 (1970). Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not

alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements. It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life.

Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this con-

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to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, here long before the advent of any compulsory education, to survive free from the heavy impediment compliance with the Wisconsin compulsory-education law would impose. Such an accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Sherbert* v. *Verner*, 374 U. S. 398, 409 (1963).

vincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. *Sherbert* v. *Verner*, *supra*.

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.[23]

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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[23] Several States have now adopted plans to accommodate Amish religious beliefs through the establishment of an "Amish vocational school." See n. 3, *supra*. These are not schools in the traditional sense of the word. As previously noted, respondents attempted to reach a compromise with the State of Wisconsin patterned after the Pennsylvania plan, but those efforts were not productive. There is no basis to assume that Wisconsin will be unable to reach a satisfactory accommodation with the Amish in light of what we now hold, so as to serve its interests without impinging on respondents' protected free exercise of their religion.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring.

This case involves the constitutionality of imposing criminal punishment upon Amish parents for their religiously based refusal to compel their children to attend public high schools. Wisconsin has sought to brand these parents as criminals for following *their* religious beliefs, and the Court today rightly holds that Wisconsin cannot constitutionally do so.

This case in no way involves any questions regarding the right of the children of Amish parents to attend public high schools, or any other institutions of learning, if they wish to do so. As the Court points out, there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents. Only one of the children testified. The last two questions and answers on her cross-examination accurately sum up her testimony:

> "Q. So I take it then, Frieda, the only reason you are not going to school, and did not go to school since last September, is because of *your* religion?
> "A. Yes.
> "Q. That is the only reason?
> "A. Yes." (Emphasis supplied.)

It is clear to me, therefore, that this record simply does not present the interesting and important issue discussed in Part II of the dissenting opinion of MR. JUSTICE DOUGLAS. With this observation, I join the opinion and the judgment of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring.

Cases such as this one inevitably call for a delicate balancing of important but conflicting interests. I join the opinion and judgment of the Court because I cannot

say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect.

This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight and since the deviation from the State's compulsory-education law is relatively slight, I conclude that respondents' claim must prevail, largely because "religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society." *Braunfeld* v. *Brown*, 366 U. S. 599, 612 (1961) (BRENNAN, J., concurring and dissenting).

The importance of the state interest asserted here cannot be denigrated, however:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954).

As recently as last Term, the Court re-emphasized the legitimacy of the State's concern for enforcing minimal educational standards, *Lemon* v. *Kurtzman*, 403 U. S. 602, 613 (1971).[1] *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society; in *Pierce*, both the parochial and military schools were in compliance with all the educational standards that the State had set, and the Court held simply that while a State may posit such standards, it may not pre-empt the educational process by requiring children to attend public schools.[2] In the present case, the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance. It is possible that most Amish

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[1] The challenged Amish religious practice here does not pose a substantial threat to public safety, peace, or order; if it did, analysis under the Free Exercise Clause would be substantially different. See *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905); *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); *Cleveland* v. *United States*, 329 U. S. 14 (1946); *Application of President and Directors of Georgetown College, Inc.*, 118 U. S. App. D. C. 80, 331 F. 2d 1000, cert. denied, 377 U. S. 978 (1964).

[2] "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534 (1925).

children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. There is evidence in the record that many children desert the Amish faith when they come of age.[3] A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past. In the circumstances of this case, although the question is close, I am unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16.

Decision in cases such as this and the administration of an exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as is exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create a forbidden establishment of religion where it is essential to implement free

[3] Dr. Hostetler testified that though there was a gradual increase in the total number of Old Order Amish in the United States over the past 50 years, "at the same time the Amish have also lost members [of] their church" and that the turnover rate was such that "probably two-thirds [of the present Amish] have been assimilated non-Amish people." App. 110. Justice Heffernan, dissenting below, opined that "[l]arge numbers of young people voluntarily leave the Amish community each year and are thereafter forced to make their way in the world." 49 Wis. 2d 430, 451, 182 N. W. 2d 539, 549 (1971).

exercise values threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective. I join the Court because the sincerity of the Amish religious policy here is uncontested, because the potentially adverse impact of the state requirement is great, and because the State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school.

MR. JUSTICE DOUGLAS, dissenting in part.

I

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.

It is argued that the right of the Amish children to religious freedom is not presented by the facts of the case, as the issue before the Court involves only the Amish parents' religious freedom to defy a state criminal statute imposing upon them an affirmative duty to cause their children to attend high school.

First, respondents' motion to dismiss in the trial court expressly asserts, not only the religious liberty of the adults, but also that of the children, as a defense to the prosecutions. It is, of course, beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their

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children as a defense.[1] Although the lower courts and a majority of this Court assume an identity of interest between parent and child, it is clear that they have treated the religious interest of the child as a factor in the analysis.

Second, it is essential to reach the question to decide the case, not only because the question was squarely raised in the motion to dismiss, but also because no analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. As in *Prince* v. *Massachusetts*, 321 U. S. 158, it is an imposition resulting from this very litigation. As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.

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[1] Thus, in *Prince* v. *Massachusetts*, 321 U. S. 158, a Jehovah's Witness was convicted for having violated a state child labor law by allowing her nine-year-old niece and ward to circulate religious literature on the public streets. There, as here, the narrow question was the religious liberty of the adult. There, as here, the Court analyzed the problem from the point of view of the State's conflicting interest in the welfare of the child. But, as MR. JUSTICE BRENNAN, speaking for the Court, has so recently pointed out, "The Court [in *Prince*] implicitly held that the custodian had standing to assert alleged freedom of religion . . . rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself." *Eisenstadt* v. *Baird*, 405 U. S. 438, 446 n. 6. Here, as in *Prince*, the children have no effective alternate means to vindicate their rights. The question, therefore, is squarely before us.

Religion is an individual experience. It is not necessary, nor even appropriate, for every Amish child to express his views on the subject in a prosecution of a single adult. Crucial, however, are the views of the child whose parent is the subject of the suit. Frieda Yoder has in fact testified that her own religious views are opposed to high-school education. I therefore join the judgment of the Court as to respondent Jonas Yoder. But Frieda Yoder's views may not be those of Vernon Yutzy or Barbara Miller. I must dissent, therefore, as to respondents Adin Yutzy and Wallace Miller as their motion to dismiss also raised the question of their children's religious liberty.

II

This issue has never been squarely presented before today. Our opinions are full of talk about the power of the parents over the child's education. See *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390. And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. See *Prince* v. *Massachusetts, supra.* Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests.

These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again. In *Haley* v. *Ohio,* 332 U. S. 596, we extended the protection of the Fourteenth Amendment in a state trial of a 15-year-old boy. In *In re Gault,* 387 U. S. 1, 13, we held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In *In re Winship,* 397 U. S. 358, we held that a 12-year-old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment.

In *Tinker* v. *Des Moines School District*, 393 U. S. 503, we dealt with 13-year-old, 15-year-old, and 16-year-old students who wore armbands to public schools and were disciplined for doing so. We gave them relief, saying that their First Amendment rights had been abridged.

> "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Id.*, at 511.

In *Board of Education* v. *Barnette*, 319 U. S. 624, we held that schoolchildren, whose religious beliefs collided with a school rule requiring them to salute the flag, could not be required to do so. While the sanction included expulsion of the students and prosecution of the parents, *id.*, at 630, the vice of the regime was its interference with the child's free exercise of religion. We said: "Here . . . we are dealing with a compulsion of students to declare a belief." *Id.*, at 631. In emphasizing the important and delicate task of boards of education we said:

> "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*, at 637.

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanog-

rapher. To do so he will have to break from the Amish tradition.[2]

It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.[3] If he is harnessed to the Amish way of life

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[2] A significant number of Amish children do leave the Old Order. Professor Hostetler notes that "[t]he loss of members is very limited in some Amish districts and considerable in others." J. Hostetler, Amish Society 226 (1968). In one Pennsylvania church, he observed a defection rate of 30%. *Ibid.* Rates up to 50% have been reported by others. Casad, Compulsory High School Attendance and the Old Order Amish: A Commentary on State v. Garber, 16 Kan. L. Rev. 423, 434 n. 51 (1968).

[3] The court below brushed aside the students' interests with the offhand comment that "[w]hen a child reaches the age of judgment, he can choose for himself his religion." 49 Wis. 2d 430, 440, 182 N. W. 2d 539, 543. But there is nothing in this record to indicate that the moral and intellectual judgment demanded of the student by the question in this case is beyond his capacity. Children far younger than the 14- and 15-year-olds involved here are regularly permitted to testify in custody and other proceedings. Indeed, the failure to call the affected child in a custody hearing is often reversible error. See, *e. g., Callicott* v. *Callicott,* 364 S. W. 2d 455 (Civ. App. Tex.) (reversible error for trial judge to refuse to hear testimony of eight-year-old in custody battle). Moreover, there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult. See, *e. g.,* J. Piaget, The Moral Judgment of the Child (1948); D. Elkind, Children and Adolescents 75–80 (1970); Kohlberg, Moral Education in the Schools: A Developmental View, in R. Muuss, Adolescent Behavior and Society 193, 199–200 (1971);

by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

The views of the two children in question were not canvassed by the Wisconsin courts. The matter should be explicitly reserved so that new hearings can be held on remand of the case.[4]

III

I think the emphasis of the Court on the "law and order" record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. I am not at all sure how the Catholics, Episcopalians, the Baptists, Jehovah's Witnesses, the Unitarians, and my own Presbyterians would make out if subjected to such a test. It is, of course, true that if a group or society was organized to perpetuate crime and if that is its motive, we would have rather startling problems akin to those that were raised when some years back a particular sect was challenged here as operating on a fraudulent basis. *United States* v. *Ballard,* 322 U. S. 78. But no such factors are present here, and the Amish, whether with a high or low crim-

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W. Kay, Moral Devolpment 172–183 (1968); A. Gesell & F. Ilg, Youth: The Years From Ten to Sixteen 175–182 (1956). The maturity of Amish youth, who identify with and assume adult roles from early childhood, see M. Goodman, The Culture of Childhood 92–94 (1970), is certainly not less than that of children in the general population.

[4] Canvassing the views of all school-age Amish children in the State of Wisconsin would not present insurmountable difficulties. A 1968 survey indicated that there were at that time only 256 such children in the entire State. Comment, 1971 Wis. L. Rev. 832, 852 n. 132.

inal record,[5] certainly qualify by all historic standards as a religion within the meaning of the First Amendment.

The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of *Reynolds* v. *United States*, 98 U. S. 145, 164, where it was said concerning the reach of the Free Exercise Clause of the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." In that case it was conceded that polygamy was a part of the religion of the Mormons. Yet the Court said, "It matters not that his belief [in polygamy] was a part of his professed religion: it was still belief, and belief only." *Id.*, at 167.

Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.

In another way, however, the Court retreats when in reference to Henry Thoreau it says his "choice was philo-

[5] The observation of Justice Heffernan, dissenting below, that the principal opinion in his court portrayed the Amish as leading a life of "idyllic agrarianism," is equally applicable to the majority opinion in this Court. So, too, is his observation that such a portrayal rests on a "mythological basis." Professor Hostetler has noted that "[d]rinking among the youth is common in all the large Amish settlements." Amish Society 283. Moreover, "[i]t would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation." *Id.*, at 300. He also notes an unfortunate Amish "preoccupation with filthy stories," *id.*, at 282, as well as significant "rowdyism and stress." *Id.*, at 281. These are not traits peculiar to the Amish, of course. The point is that the Amish are not people set apart and different.

sophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." That is contrary to what we held in *United States* v. *Seeger*, 380 U. S. 163, where we were concerned with the meaning of the words "religious training and belief" in the Selective Service Act, which were the basis of many conscientious objector claims. We said:

> "Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." *Id.*, at 176.

Welsh v. *United States*, 398 U. S. 333, was in the same vein, the Court saying:

> "In this case, Welsh's conscientious objection to war was undeniably based in part on his perception of world politics. In a letter to his local board, he wrote:
>
> " 'I can only act according to what I am and what I see. And I see that the military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to "defend" our "way of life" profoundly change that way of life. I see that in our failure to

recognize the political, social, and economic realities of the world, we, *as a nation,* fail our responsibility *as a nation.*' " *Id.,* at 342.

The essence of Welsh's philosophy, on the basis of which we held he was entitled to an exemption, was in these words:

" 'I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. This belief (and the corresponding "duty" to abstain from violence toward another person) is not "superior to those arising from any human relation." On the contrary: *it is essential to every human relation.* I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.' " *Id.,* at 343.

I adhere to these exalted views of "religion" and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race. *United States* v. *Seeger,* 380 U. S., at 192–193 (concurring opinion).

DUKES *v.* WARDEN, CONNECTICUT STATE PRISON

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 71-5172. Argued March 21, 1972—Decided May 15, 1972

Petitioner's claim that his guilty plea was not voluntarily and intelligently made because of an alleged conflict of interest on the part of his counsel has no merit, and that alleged conflict of interest is therefore not a reason for vacating his plea. Pp. 251–257.

161 Conn. 337, 288 A. 2d 58, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 257. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 259.

James A. Wade argued the cause and filed briefs for petitioner.

John D. LaBelle argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

On May 16, 1967, petitioner, on advice of counsel, pleaded guilty in the Superior Court of Hartford County, Connecticut, to charges of narcotics violation and larceny of goods. On June 16, 1967, before being sentenced, he informed the court that he had retained new counsel and desired to withdraw his plea and stand trial. The court refused to permit him to withdraw his plea and sentenced him to a term of five to 10 years on the narcotics charge and to a term of two years on the larceny charge. The Connecticut Supreme Court affirmed this conviction on his direct appeal challenging the voluntariness of his plea, *State* v. *Dukes*, 157 Conn. 498, 255 A. 2d 614 (1969), and the United States Dis-

trict Court for the District of Connecticut denied his application for federal habeas corpus relief sought in Civil Action No. 13029. He then brought this state habeas corpus action in the Superior Court for Hartford County, and attacked the voluntariness of his plea under the Federal Constitution on a ground not raised either on his direct appeal or in his action for federal habeas corpus relief. He alleged that a conflict of interest arising from his lawyer's representation of two girls with whom petitioner had been charged in an unrelated false pretenses case was known to the judge who sentenced him and rendered his plea involuntary and unintelligent. After a full hearing, the Superior Court denied relief. The Supreme Court of Connecticut affirmed, 161 Conn. 337, 288 A. 2d 58 (1971). The Supreme Court stated that, although the petition for state habeas relief alleged that the guilty plea was not voluntary and intelligent on several grounds, "[o]n appeal, however, [petitioner] has asserted in essence only that he was denied the effective assistance of counsel, which rendered his plea involuntary . . . ." 161 Conn., at 339, 288 A. 2d, at 60. We granted certiorari. 404 U. S. 937 (1971).

The two girls were represented by Mr. Zaccagnino of the firm of Zaccagnino, Linardos, & Delaney in the false pretenses case, and petitioner by another lawyer, when petitioner retained the firm to defend him in the narcotics and larceny case. There were also charges pending against petitioner in New Haven and Fairfield counties. He also faced the possibility of prosecution as a second offender, having been convicted in state court in 1961 of breaking and entry and assault.

Petitioner, accompanied by Mr. Zaccagnino, appeared on May 9, 1967, to plead to the narcotics and larceny charges. The lawyer advised him to plead guilty if a plea bargain could be negotiated whereby the State's Attorney would consolidate all outstanding charges in and out of Hartford County and agree not to prosecute

petitioner as a second offender, but to recommend a sentence of five to 10 years on the narcotics charge, two years on the larceny charge, and concurrent sentences on all the other charges. Under Conn. Gen. Stat. Rev. § 54–17a (1958) the New Haven County and Fairfield County charges would be transferred to Hartford County for disposition only if the State's Attorney of the counties consented and petitioner pleaded guilty to the charges. When petitioner refused to accept this advice, Mr. Zaccagnino asked the court to be relieved as petitioner's counsel. The court denied the request but accepted petitioner's plea of not guilty and continued the trial to the next day so that petitioner might try to retain another lawyer. As petitioner went to the corridor outside the courtroom, however, Hartford police officers arrested him on still another charge. Petitioner attempted suicide at the police station to which he was taken and was hospitalized for several days. Accordingly the trial date was postponed to May 16.

Petitioner did not engage new counsel but appeared for trial on May 16 represented by Mr. Delaney, partner of Mr. Zaccagnino who was engaged in another court. Petitioner now showed interest in a plea bargain, and Mr. Delaney and the State's Attorney engaged in negotiations, which were interrupted from time to time while Mr. Delaney consulted with petitioner. A plea bargain on the terms Mr. Zaccagnino had urged petitioner on May 9 to accept was finally struck, and petitioner withdrew his not-guilty plea and entered the guilty plea he now attacks. The State's Attorney had misgivings because of petitioner's expressed dissatisfaction with Mr. Zaccagnino the week before, and the following occurred:

> "[State's Attorney]: . . . The record also ought to appear that Mr. Delaney is here with him today and he is in the office of Mr. Zaccagnino. I think

the Court might inquire with respect to the representation since there had been some indication that counsel had asked to withdraw the other day.

"The Court: Well now, Mr. Dukes, I want to be sure that everything is in order here. . . . Now I want, now Mr. Delaney is here, are you fully satisfied with the services he is rendering you, Mr. Dukes?

"The Accused: Yes, sir.

"The Court: You are. And now you know of course, Mr. Dukes, that—you know of course that the State of Connecticut has the burden of proving you guilty on the charge and you are free to go to trial but you still wish to change your plea, is that correct?

"The Accused: Yes, sir.

"The Court: And do you do this of your own free will, Mr. Dukes?

"The Accused: Yes, sir.

"The Court: And you know the probable consequences of it?

"The Accused: Yes, sir.

"The Court: Very well, and no one has induced you to do this, influenced you one way or the other? You are doing this of your own free will?

"The Accused: Yes.

"The Court: Very well then. We will accept the change of plea."

The court set June 2, 1967, for sentencing petitioner. But the documents transferring the New Haven County and Fairfield County charges had not arrived, and the presentence report had not been completed, on that day, and the date was therefore continued to June 16, 1967. By coincidence, however, the judge's calendar for June 2 also listed the case of the two girls who, on Mr. Zaccagnino's advice, had pleaded guilty to the false pretenses charges and were to be sentenced. That pro-

ceeding did not involve petitioner because the disposition of the charges as to him was part of the plea bargain. In urging leniency for the two girls, Mr. Zaccagnino made statements putting the blame on petitioner for the girls' plight. These statements are the primary basis of petitioner's claim of divided loyalty on the part of Mr. Zaccagnino that he alleges rendered his guilty plea of May 16 involuntary and unintelligent. Mr. Zaccagnino said:

> "[B]oth of them came under the influence of Charles Dukes. Now how they could get in a position to come under the influence of somebody like him, if Your Honor pleases, creates the problem here that I think is the cause of the whole situation.
>
> "Both these girls left their homes, came under the influence of Dukes and got involved. I think, Your Honor, though, that the one thing . . . that should stand in their good stead, as a result of their willingness to cooperate with the State Police they capitulated Dukes into making a plea. I think, Your Honor, since I was on both sides of the case, having been on the other side on the other case I can tell Your Honor that it was these girls that because of their refusal . . . to cooperate with Dukes and to testify against him that capitulated him into taking a plea on which he will shortly be removed from society . . . ."

Mr. Zaccagnino appeared on June 16 to represent petitioner in the proceedings to complete the plea bargain. He was surprised to be told by petitioner that petitioner had obtained new counsel and intended to withdraw his guilty plea and stand trial. It appears from petitioner's cross-examination at the state habeas hearing that he had learned on June 2 of Mr. Zaccagnino's statements

about him when the girls were sentenced.[1] Yet he did not tell Mr. Zaccagnino that this was why he was changing lawyers, nor did he tell the court that this was why he wanted to withdraw his plea. When pressed by the court to give a reason, he answered, "At the time I pleaded, I just came out of the hospital, I think it was a day, and I was unconscious for three days, and I didn't realize at the time actually what I was pleading to."[2] His explanation for wanting another lawyer was that he thought an out-of-town lawyer would give him better service: "I would rather have an attorney out of town for certain reasons of the case." The court refused to permit petitioner to withdraw the plea and heard counsel on the question of the sentence to be imposed. The State's attorney, despite the collapse of the plea bargain, recommended, and the court imposed, a first offender's sentence of five to 10 years on the narcotics count and two years on the larceny count; that is the precise sentence the State's Attorney had agreed to recommend as part of the plea bargain. Mr. Zaccagnino, however, was concerned that petitioner's unwillingness to go through with the plea bargain left

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[1] "Q. . . . On June 2nd, weren't you in Court with Mr. Zaccagnino when your case had to be postponed . . . ?

. . . . .

"A. I'm trying to think of the day that the girls got sentenced, because I was not in Court the day they got sentenced, because I know that I wasn't in Court that specific day, *because that's when I was told what was said about me*, and so forth and so on, in Court, so I'm quite sure I wasn't in Court that day." App. to Petitioner's Brief 162–163 (emphasis supplied).

[2] The state habeas court took evidence on the question whether his plea was involuntary as the product of the after-effects of his suicide attempt and found against petitioner. Petitioner has not sought review on this question. The only issue before us is his claim that the alleged conflict of interest rendered the plea involuntary and unintelligent.

petitioner vulnerable to the prosecution on the outstanding charges in the various counties: "[I]t was a matter that Your Honor would normally . . . , in a situation like this, enter concurrent sentences, if, in fact, it was so recommended by the State's Attorney; but since [petitioner] doesn't want to plea to these other matters, I would like to make that note for the record, because I feel at some later date he may have to come back to this court and see Your Honor or see another judge on these other matters now pending before it." [3]

On this state of facts, the Connecticut Supreme Court concluded that petitioner had not sustained his claim that a conflict of interest on the part of Mr. Zaccagnino rendered his plea involuntary and unintelligent. The court said, 161 Conn., at 344–345, 288 A. 2d, at 62:

> "There is nothing in the record before us which would indicate that the alleged conflict resulted in ineffective assistance of counsel and did in fact render the plea in question involuntary and unintelligent. [Petitioner] does not claim, and it is nowhere indicated in the finding, nor could it be inferred from the finding, that either Attorney Zaccagnino or Attorney Delaney induced [petitioner] to plead guilty in furtherance of a plan to obtain more favorable consideration from the court for other clients. . . . Neither does the finding in any way disclose, nor is it claimed, that [petitioner] received misleading advice from Attorney Zaccagnino or Attorney Delaney which led him to plead guilty. . . . Moreover, the trial court specifically found that when [petitioner] engaged Zaccagnino as

[3] As events proved, all other charges pending in the various counties were dismissed, although after the decision of the Connecticut Supreme Court affirming petitioner's conviction on direct appeal. Petitioner thus received the benefits of the plea bargain without paying the cost of pleading guilty to the other offenses.

his counsel, he knew that Zaccagnino was representing two defendants in the unrelated case in which he was a codefendant, that he never complained to the court that he was not satisfied with Attorney Zaccagnino because of this dual representation, that he was not represented at the entry of his plea by Attorney Zaccagnino, that he was represented by Attorney Delaney at the entry of his plea, that he had a lengthy conversation with Attorney Delaney prior to entering his plea which he recalled completely, and that on specific inquiry by the court before he pleaded guilty, he told the court that he was satisfied with the representation by Attorney Delaney. The court did not err in concluding that [petitioner's] plea was not rendered involuntary and unintelligent by the alleged conflict of interest."

We fully agree with this reasoning and conclusion of the Connecticut Supreme Court. Since there is thus no merit in petitioner's sole contention in this proceeding—that Mr. Zaccagnino's alleged conflict of interest affected his plea—that conflict of interest is not "a reason for vacating his plea." *Santobello* v. *New York*, 404 U. S. 257, 267 (1971) (MARSHALL, J., concurring and dissenting).

Affirmed.

MR. JUSTICE STEWART, concurring.

In *Santobello* v. *New York*, 404 U. S. 257, 267, I joined MR. JUSTICE MARSHALL's separate opinion because I agree that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment." *Id.*, at 267–268.

If a defendant moves to withdraw a guilty plea before judgment and if he states a reason for doing so, I think

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that he need not shoulder a further burden of proving the "merit" of his reason at that time. Before judgment, the courts should show solicitude for a defendant who wishes to undo a waiver of all the constitutional rights that surround the right to trial—perhaps the most devastating waiver possible under our Constitution. Any requirement that a defendant prove the "merit" of his reason for undoing this waiver would confuse the obvious difference between the withdrawal of a guilty plea before the government has relied on the plea to its disadvantage, and a later challenge to such a plea, on appeal or collaterally, when the judgment is final and the government clearly has relied on the plea.

But I do not believe that these problems are presented in this case. Certiorari was granted to consider the petitioner's contention that his plea was made involuntarily and unintelligently because of his lawyer's alleged conflict of interest. This conflict-of-interest claim was not raised until a habeas corpus proceeding, years after judgment had been pronounced. The petitioner does not now challenge the refusal of the trial court to permit him to withdraw his guilty plea *before* judgment. Rather, he challenges a later refusal by the trial court to vacate his plea on a motion made well *after* judgment and sentence, presenting a claim not previously raised.

Thus, I agree with the Court that the petitioner's claim should be evaluated under the standards governing an attack on a guilty plea made after judgment, not under the far different standards governing a motion to withdraw a plea made before judgment has been pronounced. I also agree with the Court that, evaluated under the former standards, the petitioner's claim of involuntariness attributable to his counsel's conflict of interest lacks merit.

It is on this understanding that I join the opinion and judgment of the Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I dissent. Before sentencing, petitioner stated that he was innocent, and sought to vacate his guilty plea so that he could proceed to trial with new counsel in whom he had confidence. He claims, with ample support in the record, that he was advised to plead guilty—and indeed pressured to do so—by lawyers who did not devotedly represent his interests. I agree with petitioner that he should have been permitted to withdraw his guilty plea.

I

Petitioner, Charles Dukes, was arrested on March 14, 1967, and charged by Hartford, Connecticut, authorities with a violation of the Uniform State Narcotic Drug Act and with receiving stolen goods. From the beginning, there was a sharp conflict between petitioner and his lawyers over whether he should plead guilty. Two partners from the law firm that petitioner retained, each of whom handled the case on different occasions, tried to convince petitioner to plead guilty to both charges. They argued that because there were several other outstanding charges against him, petitioner's best hope was to secure an agreement to consolidate all the charges for disposition together, so that he could receive reasonable concurrent sentences. But petitioner maintained that he was innocent and would not agree to plead guilty. App. 39, 112, 119–120.

Although petitioner had not yet pleaded to either of the charges, the narcotics case was called for trial on May 9, 1967. The conflict between lawyer and client surfaced dramatically when petitioner's attorney immediately sought to withdraw from the case "because there happens to be a slight conflict between my client and myself, and it's not financial, Your Honor, it is one

basically that goes to the heart of my representing him . . . ." Noting his view that an advocate "must believe in the cause" of his client, the lawyer went on to reiterate that the disagreement might "prejudice the defendant." He reported that petitioner "either wants to represent himself or get counsel outside of the county that he can have more confidence in for some reason or other." App. 9, 10, 17. The majority concedes that this announced "conflict" was over the lawyer's insistence on pleading the client guilty. Then petitioner himself addressed the court to explain that "with local counsel I am afraid, well, I know there is going to be resentment. I have reasons to believe that through conversations, and I'd like the opportunity to hire an attorney from another state that don't [*sic*] have no knowledge of the case . . . . Otherwise . . . I intend to try my own case." App. 18. Petitioner's lawyer spoke again concluding with the judgment that he, for one, could not "do this man justice in this particular issue." App. 19–20. But the court denied counsel's motion to withdraw "at this time." Petitioner then pleaded not guilty, and trial was scheduled for the following morning.

Proceedings did not actually resume until a week later, on May 16.[1] After conversations in the courthouse that morning, App. 131–132, Dukes agreed to follow the advice of his lawyers, who admittedly had been applying "pressure" on him, App. 112, 140: he pleaded guilty to both the narcotics charge and the larceny-receiving charge. Prior to entry of the pleas, the judge asked petitioner whether he was "fully satisfied with the services [your lawyer] is rendering you . . . ." App. 24, 41.

[1] The record discloses that on May 10 the case was continued until May 16 for trial. On May 9, as petitioner left the courtroom, he was arrested by Hartford police on other charges. Petitioner attempted suicide while in police custody, and was hospitalized for several days.

Petitioner said that he was. But this satisfaction, such as it was, was short lived.

On June 16, 1967, petitioner appeared for sentencing. His lawyer immediately informed the court that petitioner wished to withdraw his plea and had secured other counsel, from New Haven. Noting the lateness of these developments, petitioner's lawyer conceded that "I had a suspicion . . . that this [might] take place because of the problem when he entered the plea. I was maybe a little forceful." And although he disputed petitioner's claim that his present lawyers did not "properly represent him," counsel once again informed the court that petitioner "doesn't have any confidence in me." App. 28, 31. Petitioner himself told the court about his difficulty in getting a lawyer who would, he thought, do him justice. He also explained that when he pleaded guilty he was still recuperating from his recent suicide attempt, see n. 1, *supra,* and "didn't realize at the time actually what I was pleading to." App. 32. See n. 8, *infra.* Thus, contrary to the majority's description, petitioner, through his lawyer and in his own voice, gave several specific reasons for wanting to withdraw his plea.

Following the prosecutor's statement opposing petitioner's request, and without any further inquiry, the judge refused to let petitioner withdraw the guilty plea. When the judge asked Dukes what he wished to say before being sentenced, Dukes replied: "I am rather flabbergasted really, because I didn't expect this this morning. It just puzzles me. I am not guilty of the charges. I am not guilty." App. 33.[2] Petitioner was sentenced to

[2] The New Haven attorney was not in the courtroom, although he had telephoned the prosecutor that morning from out of town. Petitioner apparently expected his new lawyer to be present in the courtroom and to "take over" after the guilty plea was withdrawn. App. 150–151. That lawyer did represent petitioner on his

five to 10 years on the narcotics count and two years on the receiving-stolen-property count, as the prosecutor had recommended. The alleged reason for the plea—to gain consolidation of all outstanding charges against petitioner, and thereby secure concurrent sentences on the pending charges—was never fulfilled. On the day of sentencing, petitioner refused to plead guilty to any charges, and consolidation was impossible. App. 30–33, 157.

As just noted, the sentencing judge did not inquire into the facts surrounding either petitioner's legal representation or his plea. But these facts were developed at a state habeas corpus hearing,[3] and petitioner's lack of confidence in his lawyer finds striking support in the hearing record.

That record details the sharp conflict between lawyer and client over the decision to plead guilty. But, more significantly, it reveals that the lawyer who advised petitioner to plead guilty had a gross conflict of interest. Ancillary to the instant proceedings, petitioner's lawyer was representing two young women charged with conspiracy to obtain money by false pretenses. Petitioner was a codefendant in this second case, and was represented by another attorney. This second prosecution was unrelated to the matter now before our Court. The two young women pleaded guilty to the false pretenses charges on April 18, 1967, and on June 2, 1967, appeared for sentencing. The sentencing judge was the same judge who was to sentence petitioner two weeks later.

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direct appeal to the Supreme Court of Connecticut. 157 Conn. 498, 255 A. 2d 614 (1969).

[3] I express no view on the subject of whether further evidentiary development might be appropriate were petitioner to pursue this case on federal habeas corpus. See nn. 4 and 7, *infra*. Given the way I view this case, enough is present in the record to vindicate petitioner's position.

In his remarks to the judge on behalf of the two women, the lawyer told the court that these women had come "under the influence of Charles Dukes," who had led them astray. He pointed out that their cooperation with the state police had "led to the downfall of Dukes" and "capitulated [Dukes] into taking a plea [of guilty] on which he will shortly be removed from society." [4] He placed on Dukes the blame for the offenses committed by the women, saying that he was "the most culpable since he had all the instruments with which to dupe the girls." App. 43–44, 68–71.[5] The two women were then sentenced to short prison terms.

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[4] It is not clear from the lawyer's words whether he meant that Dukes had been "capitulated" into pleading guilty to the offense allegedly committed with the two women. At the habeas hearing, the lawyer testified that he did not remember Dukes' ever taking a plea in that case. App. 122. There is a strong basis for thinking that the lawyer was in fact referring to the guilty plea entered in our case. At the women's sentencing, he specifically stated that "since I was on both sides of the case, *having been on the other side on the other case* I can tell Your Honor that it was these girls that . . . capitulated [Dukes] into taking a plea . . . ." App. 68 (emphasis added). However, the court below found that all the "remarks by [the attorney] concerning the plaintiff had only to do with the relationship of the plaintiff and the two girls in that particular case where all three of them were codefendants, and in no way referred to the present case for which he was later to be sentenced." 161 Conn. 337, 341, 288 A. 2d 58, 60. Nevertheless, certified court records sent to our Court make clear that Dukes *never pleaded guilty to the offenses involving the women,* and those charges were *nolled* in February 1970. A direct connection between the false pretenses case and our case is apparently conceded by today's majority when it notes that the plea bargain in our case included a deal in which petitioner would plead guilty to the false pretenses charge. See *ante,* at 253–254. Obviously, if counsel was in fact reporting the women's role in "capitulating" Dukes to plead guilty in our case, his own conflict of interest would be even more pernicious than that now clear from the record.

[5] The court below observed that these "improper remarks made by counsel on June 2, 1967, were a repetition of what had already

In short, to secure lighter sentences for one set of clients, the lawyer denigrated another of his clients who was to appear before the same judge for sentencing in two weeks. Even absent any showing that the lawyer's "pressure" on petitioner to plead guilty was improperly motivated, the gross conflict of interest obvious from counsel's remarks lends strong support to petitioner's presentence claim that he was not receiving devoted representation from his attorney.

II

I would permit petitioner to withdraw his guilty plea. As JUSTICE DOUGLAS has recently reminded us,

> "However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, *Duncan* v. *Louisiana*, 391 U. S. 145, to confront one's accusers, *Pointer* v. *Texas*, 380 U. S. 400, to present witnesses in one's defense, *Washington* v. *Texas*, 388 U. S. 14, to remain silent, *Malloy* v. *Hogan*, 378 U. S. 1, and to be convicted of proof beyond all reasonable doubt, *In re Winship*, 397 U. S. 358." *Santobello*

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been told to the court in substance by the state's attorney." 161 Conn., at 347, 288 A. 2d, at 63. (The court made a similar observation about the presentence report, which is not in our record.) This, of course, is irrelevant to the question of whether petitioner was represented by an attorney loyal to his interests. But, in any event, it is incorrect to say that counsel's remarks merely repeated the statements of the prosecutor. The prosecutor simply reported that the two women "became associated with one Charles Dukes . . . Charles Dukes had paraphernalia with respect to checks and money orders and they agreed to cash these checks with false credentials furnished by him." App. 65. This is a far cry from the vivid and pointedly argumentative remarks of the women's (and petitioner's) lawyer.

v. *New York*, 404 U. S. 257, 264 (1971) (concurring opinion).

See *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969). The precondition for all these rights is the constitutional "right not to plead guilty." *United States* v. *Jackson*, 390 U. S. 570, 581 (1968). A defendant may waive his constitutional rights through a guilty plea, but such waivers are not quickly presumed, and, in fact, are viewed with the "utmost solicitude." *Boykin* v. *Alabama, supra*, at 243. Our decisions, constitutional and statutory, have all recognized that, consistent with the requirements of law enforcement, adequate safeguards can and should exist to give meaning to the right not to plead guilty. *E. g., Santobello* v. *New York, supra; Brady* v. *United States*, 397 U. S. 742, 748 (1970); *Boykin* v. *Alabama, supra; McCarthy* v. *United States*, 394 U. S. 459 (1969); *White* v. *Maryland*, 373 U. S. 59 (1963); *Machibroda* v. *United States*, 368 U. S. 487 (1962); *Walker* v. *Johnston*, 312 U. S. 275 (1941); *Kercheval* v. *United States*, 274 U. S. 220 (1927).

I would not view a guilty plea as an irrevocable waiver of a defendant's federal constitutional right to a full trial, even where the plea is, strictly speaking, "voluntarily" entered. I adhere to the view that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment." *Santobello* v. *New York, supra*, at 267–268 (opinion of MARSHALL, J., concurring and dissenting, with whom BRENNAN, J., and STEWART, J., joined).

Such a rule is a sensible part of the constitutional law of waiver. We view guilty pleas with the "utmost solicitude" because they involve the simultaneous waiver of so many constitutional rights; our system of

law favors the assertion of constitutional rights, not their waiver. It is inconsistent with that basic viewpoint for guilty pleas to be irrevocable even before sentencing. Usually because of new information or new insights, defendants may have "sober second thoughts" about their pleas. Where the sentencing itself is postponed beyond the day of pleading, the door should not be slammed shut to formal reconsideration of the decision to plead guilty. A guilty plea is not a trap. Ordinarily, a defendant who changes his mind for sufficient reason and in timely fashion should not be deemed to have waived his right to a full trial. In short, absent the government's showing specific and substantial harm, I would generally permit withdrawal of the plea before sentencing.

Such a rule would not compromise the government's interests. "[I]n the ordinary case where a motion to vacate is made prior to sentencing, the government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal." *Santobello* v. *New York, supra,* at 268 (opinion of MARSHALL, J., concurring and dissenting). The defendant seeks only the basic opportunity to contest the original charges against him. A full trial could be promptly held, and, since the period between plea and sentencing is usually short, there will have been no substantial delay. Where the government *can* show specific and substantial harm, the defendant may be held to his plea. But, ordinarily, the government can claim only disappointed expectations. In such a case, the balance of interests must favor vindication of the individual's most basic constitutional rights.

In the instant case, petitioner tendered a specific reason for vacating his guilty plea. Protesting his innocence, he claimed that he was not getting satisfactory legal representation and had retained new counsel. The record as already made by June 16, 1967, showed an ad-

mitted and longstanding conflict between lawyer and client over the course of the litigation. Properly advised by loyal counsel, the defendant himself, of course, must have the ultimate decision about pleading guilty. The lawyer admitted that he had been "a little forceful" in urging petitioner to plead guilty. Given all these things, petitioner, in my view, had ample justification for rescinding the plea before sentencing.

But we need not be limited to the bare record already made by June 16, 1967. The trial judge then did not even minimally inquire into the facts behind petitioner's rather inarticulate claims. He should have done so, rather than quickly and simply denying the motion to vacate the plea. It was not until the state habeas action that the facts surrounding petitioner's representation were developed. As this subsequent record shows, petitioner's fears that he was not getting devoted representation had strong objective basis. (It is of course irrelevant that the evidence of a clear conflict of interest may have exceeded even petitioner's earlier fears of inadequate representation.[6]) As the court below concluded,

> "Obviously, the derogatory remarks by [the attorney] on behalf of his clients in one case about

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[6] The majority suggests that on June 16 petitioner knew about his lawyer's remarks at the women's sentencing, but didn't tell the court. *Ante*, at 254–255. The majority gives us no clue why petitioner would possibly want to withhold this information, if he had it. Rather, its factual conclusion rests on a single phrase in petitioner's habeas corpus testimony, and burdens this rather inarticulate petitioner with the linguistic precision of Justices of this Court. Read in context and with what I think is more common sense, petitioner's awkward phrasing clearly refers to the day "when" the lawyer's remarks were made, not when petitioner was subsequently "told" about them. I think it apparent that when petitioner sought to vacate his plea on June 16, he did not know about his lawyer's particular act of betrayal on June 2. What *is* clear, however, is that the judge who sentenced Dukes *was* fully aware of the lawyer's remarks, having heard them two weeks earlier before sentencing the women.

> a client whom he is representing in another case were highly improper. 'When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion.'" 161 Conn. 337, 345–346, 288 A. 2d 58, 62–63 (1971).

This finding of "improper" conduct gives graphic support to petitioner's presentence claim that his lawyers were not properly representing his interests, the main reason petitioner gave for wanting to withdraw his plea.

There is no need to decide whether this conflict of interest deprived petitioner of his Fourteenth Amendment right to counsel, or functioned to make his guilty plea "involuntary." It is sufficient to conclude here that, before sentencing, petitioner's plausible dissatisfaction with counsel constituted a sufficient reason for withdrawing his guilty plea.[7] The majority appears to equate the questions, suggesting by its analysis that if the plea was neither involuntary nor secured and "affected" by unconstitutionally ineffective counsel, it may not be vacated. But this is to equate the situations before and after sentencing. I think we are required to apply a much less rigorous standard before sentencing. The point in this case is that (1) petitioner sought to vacate his plea

[7] The majority intimates that we are restricted to deciding this case on a "voluntariness" theory. It is true that, since precedent suggested that petitioner's only possible line of constitutional attack was to challenge the "voluntariness" of his plea, his papers have focused on this approach, although not exclusively. See Brief for Petitioner 16, 19, 22. But we are not restricted to the precise formulation petitioner has favored. At all relevant times in this action, petitioner claimed that he should have been permitted to withdraw his guilty plea before sentencing because his lawyer was not rendering satisfactory representation. *Ibid.* This is the claim, raised here and below, which I would reach and decide.

before sentencing because he questioned the representation he was receiving, and that (2) petitioner's conclusions, on this record, were plausible, to say the least. This, it seems to me, is enough to permit withdrawal of the plea before sentencing. The majority totally ignores the fact that the record demonstrates a long-standing conflict between lawyer and client, that the lawyer himself admitted being forceful in securing the plea, and that the lawyer engaged in what the court below found to be "highly improper" conduct in conflict with the loyalty a client rightfully expects from his lawyer. As if he did not understand whose choice it is to go to trial, petitioner's own lawyer gave this extraordinary account of his relationship with petitioner, who throughout protested his innocence:

> "[Dukes] claimed consistently to me that he didn't make any sale of narcotics, and so I told him what I thought about the case, after reviewing the evidence. So from the beginning, Dukes wanted a trial, and I probably thought I might have been too forceful, but it sometimes happens that your judgment, you're trying to impose upon a client, knowing that it's in his best interest, at least in your opinion it is, and I told Charlie it would be winning the battle and clearing the way, because there was no way, with these five felony warrants pending against him, that I was able to win them all, because I said no matter what you think about this case, it's my opinion that it's your best interest to plead guilty, and at no time did I have a conversation whether he was guilty or not. Mr. Delaney handled that at the time of the change of plea, but I know when I talked to him, he maintained he was innocent. At some later date he changed his plea, so I assume there was some conversation about that, and I don't know what took place in the meantime, but basically, there

> was the reason that I made that statement to the Court, because he was insistent that he wanted to try the case, and I kept trying to get the matter put down, because I didn't think it was in his best interest to try it." App. 120.

Of course, on my view, it is of no real significance that on the day of the guilty plea petitioner expressed satisfaction with counsel. Where the loyalties of counsel are questioned even after the plea is entered, a defendant undercuts the premise of his prior guilty plea and the waiver of rights that plea entailed. Surely the same is true where, as here, the defendant specifically asserts his innocence after pleading.[8]

When a defendant gives a reason for withdrawing his plea before sentencing, and the reason is a good one, he should be allowed to withdraw the plea and regain his right to a trial. Here, petitioner's reason was conflict of interest of his lawyer. A part of this conflict was his lawyer's insistence that he plead guilty and petitioner's insistence that he was innocent. This is certainly a conflict. No wonder the last words of petitioner before sentencing were:

> "I am rather flabbergasted really, because I didn't expect this this morning. It just puzzles me. I am not guilty of the charges. I am not guilty."

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[8] Petitioner also claimed that on the day of the plea he was in a weakened physical state because of his recent hospitalization and in a confused state of mind. This claim was explored at the state habeas hearing, where petitioner also testified that when he pleaded guilty he thought that the plea was merely "temporary." App. 149–150, 154. Although the habeas court found that petitioner's plea was "voluntarily and intelligently made," App. 46, petitioner had clearly gone through a trying week before the plea. See n. 1, *supra*. In my view, the uncontradicted facts about his recent hospitalization, App. 40, would themselves entitle petitioner to a "sober second thought," and to withdraw his plea before sentencing.

The State in our case has never claimed that it would suffer any harm beyond disappointed expectations about the plea itself.[9] Where the defendant has presented a plausible reason for withdrawing his plea, this mere disappointment cannot bar him from regaining his constitutional rights before sentencing.

I would remand the case with instructions that the plea be vacated and petitioner given an opportunity to replead to the charges in the information.

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[9] Ours is not a case in which, prior to the defendant's motion to vacate his plea, the government had performed its part of a plea bargain and could not be restored to the *status quo ante*. Since petitioner had pleaded guilty to the original charges filed against him, no counts had been irrevocably dismissed prior to petitioner's motion to vacate. When, on the day of sentencing, petitioner refused to plead guilty to pending charges in other cases, he could not receive the benefits of an agreement concerning those pending charges; but the government was not thereby hurt. See *supra*, at 262. Obviously, where the government has simply agreed to recommend a specific sentence, withdrawal of the plea before sentencing would not compromise the government's position.

NATIONAL LABOR RELATIONS BOARD *v.* BURNS INTERNATIONAL SECURITY SERVICES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–123. Argued January 13, 1972—Decided May 15, 1972*

Wackenhut Corp., a company that had provided plant protection service for a Lockheed Aircraft Service Co. factory, had entered into a collective-bargaining agreement with the United Plant Guard Workers (UPG), the union certified by the National Labor Relations Board (NLRB) as the representative of a majority of Wackenhut guards at the plant after an NLRB election. A few months later, Wackenhut's service contract expired, and it was succeeded by Burns International Security Services, which knew of the collective-bargaining agreement. Burns employed 27 of the 42 Wackenhut guards but refused to recognize UPG or to honor the agreement, and denied any obligation to bargain with UPG. The NLRB found that Burns violated §§ 8 (a)(5) and 8 (a)(1) of the National Labor Relations Act by failing to recognize and bargain with UPG and by refusing to honor the collective-bargaining agreement, and ordered Burns to abide by the terms of the agreement and to "give retroactive effect to all the clauses of said [Wackenhut] contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's [Burns'] refusal to honor, adopt and enforce said contract." The Court of Appeals held that the NLRB had exceeded its powers in ordering Burns to honor the contract executed by Wackenhut. *Held:*

1. Where the bargaining unit remained unchanged and a majority of the employees hired by the new employer were represented by a recently certified bargaining agent, the NLRB correctly implemented the express mandates of §§ 8 (a)(5) and 9 (a) of the Act by ordering the new employer, Burns, to bargain with the incumbent union, UPG. Pp. 277–281.

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*Together with No. 71–198, *Burns International Security Services, Inc.* v. *National Labor Relations Board et al.*, also on certiorari to the same court.

2. While successor employers may be bound to recognize and bargain with the incumbent union, they are not bound by the substantive provisions of a collective-bargaining agreement negotiated by their predecessors but not agreed to or assumed by them. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, distinguished. Pp. 281–291.

3. The NLRB's order for monetary restitution to Burns' employees cannot be sustained on the ground that Burns committed an unfair labor practice by unilaterally changing existing terms and conditions of employment. Burns had no previous relationship to the unit and no outstanding terms and conditions of employment, so that Burns did not change *its* terms and conditions of employment when it specified the initial basis on which it would hire employees when it inaugurated its protection service at the plant. Pp. 292–296.

441 F. 2d 911, affirmed.

WHITE, J., delivered the opinion for a unanimous Court in No. 71–123, and for the Court in No. 71–198, in which DOUGLAS, STEWART, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed an opinion concurring in No. 71–123 and dissenting in No. 71–198, in which BURGER, C. J., and BRENNAN and POWELL, JJ., joined, *post*, p. 296.

Norton J. Come argued the cause for the National Labor Relations Board, petitioner in No. 71–123 and respondent in No. 71–198. With him on the brief were *Solicitor General Griswold, Harry R. Sachse, Peter G. Nash,* and *Nancy M. Sherman.*

Charles G. Bakaly, Jr., argued the cause for Burns International Security Services, Inc., respondent in No. 71–123 and petitioner in No. 71–198. With him on the brief was *Seymour Swerdlow.*

Gordon A. Gregory argued the cause and filed a brief for International Union, United Plant Guard Workers of America, et al., respondents in both cases.

Briefs of *amici curiae* were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American

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Federation of Labor and Congress of Industrial Organizations, and by *Milton A. Smith* and *Jay S. Siegel* for the Chamber of Commerce of the United States.

MR. JUSTICE WHITE delivered the opinion of the Court.

Burns International Security Services, Inc. (Burns), replaced another employer, the Wackenhut Corp. (Wackenhut), which had previously provided plant protection services for the Lockheed Aircraft Service Co. (Lockheed) located at the Ontario International Airport in California. When Burns began providing security service, it employed 42 guards; 27 of them had been employed by Wackenhut. Burns refused, however, to bargain with the United Plant Guard Workers of America (UPG) which had been certified after a National Labor Relations Board (Board) election as the exclusive bargaining representative of Wackenhut's employees less than four months earlier. The issues presented in this case are whether Burns refused to bargain with a union representing a majority of employees in an appropriate unit and whether the National Labor Relations Board could order Burns to observe the terms of a collective-bargaining contract signed by the union and Wackenhut that Burns had not voluntarily assumed. Resolution turns to a great extent on the precise facts involved here.

I

The Wackenhut Corp. provided protection services at the Lockheed plant for five years before Burns took over this task. On February 28, 1967, a few months before the changeover of guard employers, a majority of the Wackenhut guards selected the union as their exclusive bargaining representative in a Board election after Wackenhut and the union had agreed that the Lockheed plant was the appropriate bargaining unit. On March 8,

the Regional Director certified the union as the exclusive bargaining representative for these employees, and, on April 29, Wackenhut and the union entered into a three-year collective-bargaining contract.

Meanwhile, since Wackenhut's one-year service agreement to provide security protection was due to expire on June 30, Lockheed had called for bids from various companies supplying these services, and both Burns and Wackenhut submitted estimates. At a pre-bid conference attended by Burns on May 15, a representative of Lockheed informed the bidders that Wackenhut's guards were represented by the union, that the union had recently won a Board election and been certified, and that there was in existence a collective-bargaining contract between Wackenhut and the union. App. 4–5, 126.[1] Lockheed then accepted Burns' bid, and on May 31 Wackenhut was notified that Burns would assume responsibility for protection services on July 1. Burns chose to retain 27 of the Wackenhut guards, and it brought in 15 of its own guards from other Burns locations.

During June, when Burns hired the 27 Wackenhut guards, it supplied them with membership cards of the American Federation of Guards (AFG), another union with which Burns had collective-bargaining contracts at other locations, and informed them that they had to become AFG members to work for Burns, that they would not receive uniforms otherwise, and that Burns "could not live with" the existing contract between Wackenhut and the union. On June 29, Burns recognized the AFG on the theory that it had obtained a card majority. On July 12, however, the UPG demanded that Burns recog-

[1] A Burns executive later admitted in the unfair-labor-practice proceeding that Burns was aware of the union's status, the unit certification, and the collective-bargaining contract after the May 15 meeting. App. 105.

nize it as the bargaining representative of Burns' employees at Lockheed and that Burns honor the collective-bargaining agreement between it and Wackenhut. When Burns refused, the UPG filed unfair labor practice charges, and Burns responded by challenging the appropriateness of the unit and by denying its obligation to bargain.

The Board, adopting the trial examiner's findings and conclusions, found the Lockheed plant an appropriate unit and held that Burns had violated §§ 8 (a)(2) and 8 (a)(1) of the National Labor Relations Act, 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. §§ 158 (a)(2), 158 (a)(1), by unlawfully recognizing and assisting the AFG, a rival of the UPG; and that it had violated §§ 8 (a)(5) and 8 (a)(1), 29 U. S. C. §§ 158 (a)(5), 158 (a)(1), by failing to recognize and bargain with the UPG and by refusing to honor the collective-bargaining agreement that had been negotiated between Wackenhut and UPG.[2]

Burns did not challenge the § 8 (a)(2) unlawful assistance finding in the Court of Appeals but sought review of the unit determination and the order to bargain and observe the pre-existing collective-bargaining contract. The Court of Appeals accepted the Board's unit determination and enforced the Board's order insofar as it

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[2] In regard to this latter finding, the Board stated:

"The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

. . . . . .

"We find, therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8 (d) and 8 (a)(5) of the Act."

related to the finding of unlawful assistance of a rival union and the refusal to bargain, but it held that the Board had exceeded its powers in ordering Burns to honor the contract executed by Wackenhut. Both Burns and the Board petitioned for certiorari, Burns challenging the unit determination and the bargaining order and the Board maintaining its position that Burns was bound by the Wackenhut contract, and we granted both petitions, though we declined to review the propriety of the bargaining unit, a question which was presented in No. 71–198. 404 U. S. 822 (1971).

II

We address first Burns' alleged duty to bargain with the union, and in doing so it is well to return to the specific provisions of the Act, which courts and the Board alike are bound to observe. Section 8 (a)(5), as amended by the Labor Management Relations Act, 1947, 29 U. S. C. § 158 (a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title." Section 159 (a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." Because the Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, the initial issue before the Board was whether the charging union was such a bargaining representative.

The trial examiner first found that the unit designated by the regional director was an appropriate unit for bargaining. The unit found appropriate was defined as "[a]ll full-time and regular part-time employees of

[Burns] performing plant protection duties as determined in Section 9 (b)(3) of the [National Labor Relations] Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act." This determination was affirmed by the Board, accepted by the Court of Appeals, and is not at issue here because pretermitted by our limited grant of certiorari.

The trial examiner then found, *inter alia,* that Burns "had in its employ a majority of Wackenhut's former employees," and that these employees had already expressed their choice of a bargaining representative in an election held a short time before. Burns was therefore held to have a duty to bargain, which arose when it selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past.

The Board, without revision, accepted the trial examiner's findings and conclusions with respect to the duty to bargain, and we see no basis for setting them aside. In an election held but a few months before, the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in the identical unit. It is undisputed that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective-bargaining contract. In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and

Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer. *NLRB* v. *Downtown Bakery Corp.*, 330 F. 2d 921, 925 (CA6 1964); *NLRB* v. *McFarland*, 306 F. 2d 219, 221 (CA10 1962); *NLRB* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307 (CA5 1960); *NLRB* v. *Lunder Shoe Corp.*, 211 F. 2d 284, 286 (CA1 1954); *NLRB* v. *Armato*, 199 F. 2d 800, 803 (CA7 1952); *South Carolina Granite Co.*, 58 N. L. R. B. 1448, 1463–1464 (1944), enforced *sub nom. NLRB* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (CA4 1945); *Northwest Glove Co.*, 74 N. L. R. B. 1697, 1700 (1947); *Johnson Ready Mix Co.*, 142 N. L. R. B. 437, 442 (1963).[3]

It goes without saying, of course, that Burns was not entitled to upset what it should have accepted as an established union majority by soliciting representation

[3] Cf. § 9 (c)(3) of the NLRA, 29 U. S. C. § 159 (c)(3), which provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." See *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 599 n. 14 (1969).

Where an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year. See *Brooks* v. *NLRB*, 348 U. S. 96, 98–99 (1954). After this period, there is a rebuttable presumption of majority representation. *Celanese Corp. of America*, 95 N. L. R. B. 664, 672 (1951). If there is a change of employers, however, and an almost complete turnover of employees, the certification may not bar a challenge if the successor employer is not bound by the collective-bargaining contract, particularly if the new employees are represented by another union or if the old unit is ruled an accretion to another unit. Cf. *McGuire* v. *Humble Oil & Refining Co.*, 355 F. 2d 352 (CA2), cert. denied, 384 U. S. 988 (1966). See n. 5, *infra*.

cards for another union and thereby committing the unfair labor practice of which it was found guilty by the Board. That holding was not challenged here and makes it imperative that the situation be viewed as it was when Burns hired its employees for the guard unit, a majority of whom were represented by a Board-certified union. See *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 609, 610–616 (1969).

It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one.[4] Likewise, it would be different if Burns had not hired employees already represented by a union certified as a bargaining agent,[5] and the Board recognized as

[4] The Court of Appeals was unimpressed with the asserted differences between Burns' and Wackenhut's operations: "All of the important factors which the Board has used and the courts have approved are present in the instant case: 'continuation of the same types of product lines, departmental organization, employee identity and job functions.' . . . Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42." 441 F. 2d 911, 915 (1971) (citation omitted). Although the labor policies of the two companies differed somewhat, the Board's determination that the bargaining unit remained appropriate after the changeover meant that Burns would face essentially the same labor relations environment as Wackenhut: it would confront the same union representing most of the same employees in the same unit.

[5] The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer. But cf. *Chemrock Corp.*, 151 N. L. R. B. 1074 (1965). However, an employer who declines to hire employees solely because

much at oral argument.[6] But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8 (a)(5) and § 9 (a) by ordering the employer to bargain with the incumbent union. This is the view of several courts of appeals and we agree with those courts. *NLRB* v. *Zayre Corp.*, 424 F. 2d 1159, 1162 (CA5 1970); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F. 2d 1025, 1026–1027 (CA7 1969); *S. S. Kresge Co.* v. *NLRB*, 416 F. 2d 1225, 1234 (CA6 1969); *NLRB* v. *McFarland*, 306 F. 2d, at 220.

III

It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms

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they are members of a union commits a § 8 (a)(3) unfair labor practice. See *K. B. & J. Young's Super Markets, Inc.* v. *NLRB*, 377 F. 2d 463 (CA9), cert. denied, 389 U. S. 841 (1967); *NLRB* v. *New England Tank Industries, Inc.*, 302 F. 2d 273 (CA1), cert. denied, 371 U. S. 875 (1962); *Piasecki Aircraft Corp.* v. *NLRB*, 280 F. 2d 575 (CA3 1960), cert. denied, 364 U. S. 933 (1961); *Tri State Maintenance Corp.*, 167 N. L. R. B. 933 (1967), enforced with mod. *sub nom. Tri State Maintenance Corp.* v. *NLRB*, 132 U. S. App. D. C. 368, 408 F. 2d 171 (1968). Further restrictions on the successor employer's choice of employees would seem to follow from the Board's instant decision that the employer must honor the pre-existing collective-bargaining contract. See *infra*, at 288–290.

[6] "Q. But [counsel for the Union], when he argued, said that even if [Burns] hadn't taken over any [employees of Wackenhut], even if they hadn't taken over a single employee, the legal situation would be the same.

"Mr. Come [for the NLRB]. We do not go that far. We don't think that you have to go that far in——

"Q. Do you think it has to be a majority?

"Mr. Come. I wouldn't say that it has to be a majority, I think it has to be a substantial number. It has to be enough to give you a continuity of employment conditions in the bargaining unit." Tr. of Oral Arg. 64–65.

of the collective-bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed. Section 8 (d) of the Act expressly provides that the existence of such bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." Congress has consistently declined to interfere with free collective bargaining[7] and has preferred that device, or voluntary arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes. In its report accompanying the 1935 Act, the Senate Committee on Education and Labor stated:

> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

This Court immediately noted this fundamental theme of the legislation: "[The Act] does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements

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[7] Two exceptions to this general reluctance to interfere with free collective bargaining are the imposition of compulsory arbitration during wartime, Exec. Order No. 9017 (1942), and, on occasion, in the railroad industry, 77 Stat. 132, 81 Stat. 122. Congress has consistently rejected compulsory arbitration even as a remedy for "national emergency" disputes, however. See Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U. L. Rev. 735, 742–743 (1969).

which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). See also *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 401–402 (1952); *Teamsters Local 357* v. *NLRB*, 365 U. S. 667, 676–677 (1961).

Section 8 (d), 29 U. S. C. § 158 (d), made this policy an express statutory mandate, and was enacted in 1947 because Congress feared that "the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . . [U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements." H. R. Rep. No. 245, 80th Cong., 1st Sess., 19–20 (1947).

This history was reviewed in detail and given controlling effect in *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970). There this Court, while agreeing that the employer violated § 8 (a)(5) by adamantly refusing to agree to a dues checkoff, intending thereby to frustrate the consummation of any bargaining agreement, held that the Board had erred in ordering the employer to agree to such a provision:

> "[W]hile the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.
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> . . . . . .
>
> "It would be anomalous indeed to hold that while § 8 (d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel

agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract." 397 U. S., at 102, 108 (citations omitted).

These considerations, evident from the explicit language and legislative history of the labor laws, underlay the Board's prior decisions, which until now have consistently held that, although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them. *Rohlik, Inc.*, 145 N. L. R. B. 1236, 1242 n. 15 (1964); *General Extrusion Co.*, 121 N. L. R. B. 1165, 1168 (1958); *Jolly Giant Lumber Co.*, 114 N. L. R. B. 413, 414 (1955); *Slater System Maryland, Inc.*, 134 N. L. R. B. 865, 866 (1961); *Matter of ILWU (Juneau Spruce)*, 82 N. L. R. B. 650, 658–659 (1949), enforced, 189 F. 2d 177 (CA9 1951), aff'd on other grounds, 342 U. S. 237 (1952). As the Court of Appeals said in this case, "In none of the previous successorship cases has the Board ever reached that result. The successor has always been held merely to have the duty of bargaining with his predecessor's union." [8] 441 F. 2d, at 915.

[8] When the union that has signed a collective-bargaining contract is decertified, the succeeding union certified by the Board is not bound by the prior contract, need not administer it, and may demand negotiations for a new contract, even if the terms of the old contract have not yet expired. *American Seating Co.*, 106 N. L. R. B. 250 (1953); *Farmbest, Inc.*, 154 N. L. R. B. 1421, 1453–1454 (1965), enf. with mod. *sub nom. Farmbest, Inc.* v. *NLRB*, 370 F. 2d 1015 (CA8 1967); see also *Modine Mfg. Co.* v. *International Association of Machinists*, 216 F. 2d 326 (CA6 1954). The Board has declined to overturn its "long standing" *American Seating* rule after *Burns*. *General Dynamics Corp.*, 184 N. L. R. B. No. 71 (1970).

The Board, however, has now departed from this view and argues that the same policies that mandate a continuity of bargaining obligation also require that successor employers be bound to the terms of a predecessor's collective-bargaining contract. It asserts that the stability of labor relations will be jeopardized and that employees will face uncertainty and a gap in the bargained-for terms and conditions of employment, as well as the possible loss of advantages gained by prior negotiations, unless the new employer is held to have assumed, as a matter of federal labor law, the obligations under the contract entered into by the former employer. Recognizing that under normal contract principles a party would not be bound to a contract in the absence of consent, the Board notes that in *John Wiley & Sons, Inc.* v. *Livingston,* 376 U. S. 543, 550 (1964), the Court declared that "a collective bargaining agreement is not an ordinary contract" but is, rather, an outline of the common law of a particular plant or industry. The Court held in *Wiley* that although the predecessor employer which had signed a collective-bargaining contract with the union had disappeared by merger with the successor, the union could compel the successor to arbitrate the extent to which the successor was obligated under the collective-bargaining agreement. The Board contends that the same factors that the Court emphasized in *Wiley,* the peaceful settlement of industrial conflicts and "protection [of] the employees [against] a sudden change in the employment relationship," *id.,* at 549, require that Burns be treated under the collective-bargaining contract exactly as Wackenhut would have been if it had continued protecting the Lockheed plant.

We do not find *Wiley* controlling in the circumstances here. *Wiley* arose in the context of a § 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8 (d). That

decision emphasized "[t]he preference of national labor policy for arbitration as a substitute for tests of strength before contending forces" and held only that the agreement to arbitrate, "construed in the context of a national labor policy," survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract. *Id.*, at 549, 551.

Wiley's limited accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes does not warrant the Board's holding that the employer commits an unfair labor practice unless he honors the substantive terms of the pre-existing contract. The present case does not involve a § 301 suit; nor does it involve the duty to arbitrate. Rather, the claim is that Burns must be held bound by the contract executed by Wackenhut, whether Burns has agreed to it or not and even though Burns made it perfectly clear that it had no intention of assuming that contract. *Wiley* suggests no such open-ended obligation. Its narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation. See N. Y. Stock Corp. Law § 90 (1951); 15 W. Fletcher, Private Corporations § 7121 (1961 rev. ed.). Here there was no merger or sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by § 8 (a)(5) and § 9 (a).

But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract.

We agree with the Court of Appeals that the Board failed to heed the admonitions of the *H. K. Porter* case. Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur. This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will. Here, Burns had notice of the existence of the Wackenhut collective-bargaining contract, but it did not consent to be bound by it. The source of its duty to bargain with the union is not the collective-bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year. Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract, and "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H. K. Porter Co.* v. *NLRB*, 397 U. S., at 108.

We also agree with the Court of Appeals that holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, com-

position of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof.[9] Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing

[9] The vast majority of collective-bargaining agreements specify the procedures to be used in choosing employees for available jobs, and approximately 92% of all such contracts place some limitations on the right to discharge. Collective Bargaining Negotiations and Contracts §§ 40:1, 60:11 (BNA 1971). Under the Board's theory, if a successor refused to hire or fired any of the predecessor's employees without going through applicable grievance procedures, it might be guilty of a § 8(a)(5) refusal to bargain. See *NLRB* v. *Strong*, 393 U. S. 357, 359 (1969); *NLRB* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 968–969 (CA8 1967).

contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. Nor would the union commit a § 8 (b)(3) unfair labor practice if it refused to bargain for a modification of the agreement effective prior to the expiration date of the agreement.[10] A successor employer might also be deemed to have

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[10] Section 8 (d) of the Act provides, in part:

"[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2)–(4) of this subsection . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U. S. C. § 158 (d).

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inherited its predecessor's pre-existing contractual obligations to the union that had accrued under past contracts and that had not been discharged when the business was transferred. "[A] successor may well acquire more liabilities as a result of *Burns* than appear on the face of a contract." [11] Finally, a successor will be bound to observe the contract despite good-faith doubts about the union's majority during the time that the contract is a bar to another representation election, *Ranch-Way, Inc,* 183 N. L. R. B. No. 116 (1970).[12] For the above reasons, the Board itself has expressed doubts as to the general applicability of its *Burns* rule.[13]

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[11] Doppelt, Successor Companies: The NLRB Limits the Options—and Raises Some Problems, 20 DePaul L. Rev. 176, 191 (1971).

[12] The Board imposes this contract-bar rule for the term of a collective bargaining of "reasonable duration," a period the Board now defines as three years. *General Cable Corp.,* 139 N. L. R. B. 1123 (1962). Also during this time, an employer cannot use doubt about a union's majority as a defense to a refusal-to-bargain charge. *Oilfield Maintenance Co.,* 142 N. L. R. B. 1384, 1387 (1963); *Hexton Furniture Co.,* 111 N. L. R. B. 342 (1955). Prior to *Burns,* the Board had held that a successor was barred by the contract of the predecessor from requesting a representation election during the term of the contract only if it had assumed the contract. *Jolly Giant Lumber Co.,* 114 N. L. R. B. 413 (1955); *General Extrusion Co.,* 121 N. L. R. B. 1165 (1958); *MV Dominator,* 162 N. L. R. B. 1514 (1967). Moreover, such assumption had to be by an express written agreement. *American Concrete Pipe of Hawaii, Inc.,* 128 N. L. R. B. 720 (1960). The Board had also permitted a non-assuming successor to raise a good-faith doubt as to the union's majority as a defense to a refusal-to-bargain charge during the term of the old contract. *Randolph Rubber Co.,* 152 N. L. R. B. 496 (1965); *Mitchell Standard Corp.,* 140 N. L. R. B. 496 (1963).

[13] *Emerald Maintenance, Inc.,* 188 N. L. R. B. No. 139 (1971). *Emerald* involved a civilian contractor who undertook to provide certain maintenance services at an Air Force base. During the preceding year, the same services had been performed by two other companies whose employees were represented by a union that had

In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. Cf. *Oilfield Maintenance Co.*, 142 N. L. R. B. 1384 (1963). Such a duty does not, however, ensue as a matter of law from the mere fact than an employer is doing the same work in the same place with the same employees as his predecessor, as the Board had recognized until its decision in the instant case. See cases cited *supra*, at 284. We accordingly set aside the Board's finding of a § 8 (a)(5) unfair labor practice insofar as it rested on a conclusion that Burns was required to but did not honor the collective-bargaining contract executed by Wackenhut.

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negotiated collective-bargaining agreements that had not yet expired. The employer performed the work with substantially the same employee complement as had its predecessors. The Board held that the employer had a duty to recognize and bargain with the union but could not agree with the trial examiner that the employer was bound by the provisions of the contract, emphasizing in this respect the impact of the Service Contract Act of 1965, 79 Stat. 1034. The case was considered as presenting unusual circumstances justifying an exception to the *Burns* rule; the Board noted that "[t]his case suggests the hazards of enforcing the contracts of one employer against a successor where annual rebidding normally produces annual changes in contractor identity. These circumstances might encourage less arm's-length collective bargaining whenever the employer had reason to expect that it would not be awarded the next succeeding annual service contract." An *amicus* strongly contends that the *Emerald* rule is inconsistent with *Burns* and is based on a misreading of the legislative history of the Service Contract Act of 1965. Brief for AFL–CIO as *Amicus Curiae* 23 n. 2.

IV

It therefore follows that the Board's order requiring Burns to "give retroactive effect to all the clauses of said [Wackenhut] contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's [Burns'] refusal to honor, adopt and enforce said contract" must be set aside.[14] We

[14] In its entirety, the Board's order required Burns to:

"1. Cease and desist from:

"(a) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above-described unit.

"(b) Refusing to adopt, honor and enforce its contract with the Union, as successor of Wackenhut.

"(c) Assisting or recognizing AFG as the representative of its employees for the purposes of collective bargaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in an appropriate unit.

"(d) Interfering with representation of its employees through labor organizations of their own choosing.

"(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or otherwise engage in activities protected by the Act.

"2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

"(a) Withdraw and withhold recognition from AFG until or unless it is certified as bargaining representative of Respondent's employees in an appropriate unit.

"(b) Bargain collectively, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

"(c) Honor, adopt and enforce the contract between Respondent, as successor to Wackenhut, and the Union and give retroactive effect to all the clauses of said contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's refusal to honor, adopt and enforce said contract.

"(d) Post at its Lockheed, Ontario, California, operations copies of the notice attached hereto as 'Appendix.' Copies of said notice,

note that the regional director's charge instituting this case asserted that "[o]n or about July 1, 1967, Respondent [Burns] unilaterally changed existing wage rates, hours of employment, overtime wage rates, differentials for swing shift and graveyard shift, and other terms and conditions of employment of the employees in the appropriate unit . . . ," App. 113, and that the Board's opinion stated that "[t]he obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement had expired. In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements." App. 8–9. This statement by the Board is consistent with its prior and subsequent cases that hold that whether or not a successor employer is bound by its predecessor's contract, it must not institute terms and conditions of employment different from those provided in its predecessor's contract, at least without first bargaining with the employees' representative. *Overnite Transportation Co.*, 157 N. L. R. B. 1185 (1966), enforced *sub nom. Overnite Transportation Co.* v. *NLRB*, 372 F. 2d 765 (CA4), cert. denied, 389 U. S. 838 (1967); *Valleydale Packers, Inc.*, 162 N. L. R. B. 1486 (1967), enforced *sub*

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to be furnished by the Regional Director for Region 31, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

"(e) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith."

nom. NLRB v. *Valleydale Packers, Inc.*, 402 F. 2d 768 (CA5 1968); *Michaud Bus Lines, Inc.*, 171 N. L. R. B. 193 (1968); *Emerald Maintenance, Inc.*, 188 N. L. R. B. No. 139 (1971). Thus, if Burns, without bargaining to impasse with the union, had paid its employees on and after July 1 at a rate lower than Wackenhut had paid under its contract, or otherwise provided terms and conditions of employment different from those provided in the Wackenhut collective-bargaining agreement, under the Board's view, Burns would have committed a § 8 (a) (5) unfair labor practice and would have been subject to an order to restore to employees what they had lost by this so-called unilateral change. See *Overnite Transportation Co., supra; Emerald Maintenance, Inc., supra.*

Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8 (a)(5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is per-

fectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9 (a) of the Act, 29 U. S. C. § 159 (a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. The Board quite properly found that Burns refused to bargain on July 12 when it rejected the overtures of the union. It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice. Cf. *NLRB* v. *Katz*, 369 U. S. 736, 745 n. 12 (1962); *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 272–273 (CA2) cert. denied, 375 U. S. 834 (1963); *NLRB* v. *Southern Coach & Body Co.*, 336 F. 2d 214, 217 (CA5 1964). The Board's order requiring Burns to make whole its employees for any losses suffered by reason of Burns' refusal to honor and enforce the contract, cannot therefore

be sustained on the ground that Burns unilaterally changed existing terms and conditions of employment, thereby committing an unfair labor practice which required monetary restitution in these circumstances.

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE POWELL join, concurring in No. 71–123 and dissenting in No. 71–198.

Although the Court studiously avoids using the term "successorship" in concluding that Burns did have a statutory obligation to bargain with the union, it affirms the conclusions of the Board and the Court of Appeals to that effect which were based entirely on the successorship doctrine. Because I believe that the Board and the Court of Appeals stretched that concept beyond the limits of its proper application, I would enforce neither the Board's bargaining order nor its order imposing upon Burns the terms of the contract between the union and Wackenhut. I therefore concur in No. 71–123 and dissent in No. 71–198.

The National Labor Relations Act imposes upon an employer the obligation "to . . . bargain collectively with the representatives of his employees . . . ." 29 U. S. C. § 158 (a)(5). It also defines those representatives, in § 159 (a), as "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . . ." The union must establish its status as a majority representative either by one of the methods discussed in *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), or because its certification as a representative of the employees of another employer binds Burns as a "successor."

The Court concludes that because the trial examiner and the Board found the Lockheed facility to be an appropriate bargaining unit for Burns' employees, and because Burns hired a majority of Wackenhut's previous employees who had worked at that facility, Burns should have bargained with the union, even though the union never made any showing to Burns of majority representation. There is more than one difficulty with this analysis.

First, it is by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract with Lockheed. True, 27 of the 42 had been represented by the union when they were employees of Wackenhut, but there is nothing in the record before us to indicate that all 27 of these employees chose the union as their bargaining agent even at the time of negotiations with Wackenhut. There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by Wackenhut, had ever expressed their views one way or the other about the union as a bargaining representative. It may be that, if asked, all would have designated the union. But they were never asked. Instead, the trial examiner concluded that because Burns was a "successor" employer to Wackenhut, it was obligated by that fact alone to bargain with the union.

The second problem with the Court's reasoning is that it relies on the Board's approval of the Lockheed plant as an appropriate unit to support its conclusion that Burns must bargain with the union. While it is true, as the Court notes, that the trial examiner and the Board found the Lockheed facility to be an appropriate bargaining unit for Burns' employees, it is equally true that the trial examiner's finding to this effect was clearly dependent upon the previous stipulation between

Wackenhut and the union.[1] One of the reasons asserted by Burns for declining to recognize the union was its belief that the single Lockheed facility was not an appropriate bargaining unit. This was more than a colorable claim. Unlike Wackenhut, Burns had never bargained with a union consisting of its employees in a single job location. One of the reasons for this difference was that Burns made a practice of transferring employees from one job to another, on a temporary or permanent basis. Both Burns and Wackenhut had numerous security guard jobsites in Southern California; for administrative purposes, Wackenhut treated each jobsite as a separate unit, while Burns treated large numbers of them together.

The Court says in effect that the Burns employees at Lockheed were found by the Board to be an appropriate unit; that Burns has not expressly preserved that point for review here; and that Burns is therefore obligated to bargain with the previously certified union. But the major premise leading to this conclusion, the determination of the appropriate unit, was itself established by the Board and sustained by the Court of Appeals solely under the doctrine of successorship. Burns is neither required to expressly challenge the designation of the bargaining unit, nor to prevail in such a challenge in order to demonstrate the error in the bargaining order. Burns has expressly challenged the determination that underlay both the determina-

[1] "While a broader unit might have been appropriate, I find a unit of guards limited to a single facility as an appropriate unit. Here, the certification was pursuant to a consent election agreement." Trial Examiner's decision, App. 22.

"Trial Examiner: I am not concerned with whether or not there was a hearing. The Regional Director approved of the consent election and stipulation, and the election having taken place, I would find that the Regional Director's action was properly conducted in due course . . . ." Proceedings before the NLRB, App. 68.

tion as to bargaining unit and the bargaining order—the finding of successorship.

Thus, in a situation where there was no evidence at the time as to the preference of a majority of the employees at the Lockheed facility as to a bargaining agent, and there was no independent finding that the employees at that facility were an appropriate unit as to Burns, the Board nonetheless imposed the duty to bargain. This result is sustainable, if at all, only on the theory that Burns was a "successor" to Wackenhut.[2] The imposition of successorship in this case is unusual because the successor instead of purchasing business or assets from or merging with Wackenhut was in direct competition with Wackenhut for the Lockheed contract. I believe that a careful analysis of the admittedly imprecise concept of successorship indicates that important rights of both the employee and the employer to independently order their own affairs are sacrificed needlessly by the application of that doctrine to this case.

It has been aptly observed that the doctrine of "successor" employer in the field of labor law is "shrouded in somewhat impressionist approaches."[3] In *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964), we employed a form of the "successor" doctrine to impose upon an employer an obligation to arbitrate disputes under an arbitration clause in an agreement entered into between a predecessor employer and the bargaining representative of the latter's employees. The doctrine has been applied by the Board and by the courts of

[2] The Court's emphasis, *ante*, at 275–276, on the Board's determination that Burns committed unfair practices by aiding the AFG cannot be taken as any support for the bargaining order. It merely supports the cease-and-desist order directing Burns to stop such practices, which has not been challenged here by Burns.

[3] *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C. 239, 243, 414 F. 2d 1135, 1139 (1969) (Leventhal, J., concurring).

appeals to impose upon the successor employer a duty to bargain with representatives of the employees of his predecessor, *NLRB* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 304 (CA5 1960); *Makela Welding, Inc.* v. *NLRB*, 387 F. 2d 40, 46 (CA6 1967), to support a finding of unfair labor practices from a course of conduct engaged in by both the predecessor and the successor, *NLRB* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (CA4 1945), and to require the successor to remedy unfair labor practices committed by a predecessor employer, *United States Pipe & Foundry Co.* v. *NLRB*, 398 F. 2d 544 (CA5 1968). The consequences of the application of the "successor" doctrine in each of these cases has been that the "successor" employer has been subjected to certain burdens or obligations to which a similarly situated employer who is not a "successor" would not be subject.

The various decisions that have applied the successor doctrine exhibit more than one train of reasoning in support of its application. There is authority for the proposition that it rests in part at least upon the need for continuity in industrial labor relations, and the concomitant avoidance of industrial strife that presumably follows from such continuity. *NLRB* v. *Colten*, 105 F. 2d 179 (CA6 1939); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F. 2d 1025 (CA7 1969). On examination, however, this proposition may more accurately be described as a statement of the result of a finding of successorship, rather than a reason for making that finding.

Other cases have stated the guiding principle to be whether the "employing industry" remains essentially the same after the change in ownership. *NLRB* v. *Tempest Shirt Mfg. Co.*, 285 F. 2d 1 (CA5 1960); *NLRB* v. *Alamo White Truck Service, Inc.*, 273 F. 2d 238 (CA5 1959). Under this approach a variety of facts relating to the "employing industry" have been examined to see whether a sufficient number remain unchanged to warrant the imposition of successorship. While it cannot be

doubted that a determination as to successorship will vary with different fact situations, some general concept of the reason for the successorship doctrine is essential in order to determine the importance of the various factual combinations and permutations that may or may not call for its application.

This Court's opinion in *Wiley* makes it clear that one of the bases for a finding of successorship is the need to grant some protection to employees from a sudden transformation of their employer's business that results in the substitution of a new legal entity, not bound by the collective-bargaining contract under contract law, as the employer, but leaves intact significant elements of the employer's business. The Court said there:

> "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces'. . . ." 376 U. S., at 549.

But other language in *Wiley* makes it clear that the considerations favoring the continuity of existing bargaining relationships are not without their limits:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would

> make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U. S., at 551.

The conflicting implications in these portions of the opinion in *Wiley* suggest that employees are indeed entitled to a measure of protection against change in the employing entity where the new employer continues to make use of tangible or intangible assets used in carrying on the business of the first employer. They also make clear that the successorship doctrine, carried to its ultimate limits, runs counter to other equally well-established principles of labor law. Industrial peace is an important goal of the Labor Management Relations Act. But Congress has time and again refused to sacrifice free collective bargaining between representatives of the employees and the employer for a system of compulsory arbitration.[4] As the Court said in *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960):

> "The mainstream of cases before the Board and in the courts reviewing its orders, under the provisions fixing the duty to bargain collectively, is concerned

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[4] "Except in isolated instances, . . . Congress and the Supreme Court have refused to compel, or even to allow, that form of governmental compulsion of economic decisions which has come to be called 'compulsory arbitration.'" Jones, Compulsion and the Consensual in Labor Arbitration, 51 Va. L. Rev. 369 (1965).

"In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. . . . [W]e do not feel warranted in recommending that any such plans become permanent legislation." S. Rep. No. 105, 80th Cong., 1st Sess., 13 (1947). See also the speech by Senator Taft, during debate on the Taft-Hartley Act, 93 Cong. Rec. 3835–3836, cited in *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 395 n. 21 (1951).

> with insuring that the parties approach the bargaining table with this attitude [good faith]. But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."

And this Court has recently held that the Board itself may not compel one of the parties in the collective-bargaining process to agree to any particular proposal of the other. *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970). Conceivably the imposition of a system of compulsory arbitration, or the granting of authority to the Board to insist that the parties at some point agree on particular terms of a potential contract, would lessen the risk of industrial strife. But Congress has plainly been unwilling to purchase industrial peace at the price of substantial curtailment of free collective bargaining by the freely chosen representatives of the employees with their employer.

There is also a natural tension between the constraints imposed on employers by the Labor Management Relations Act, and the right of those employers in competition with one another "independently to rearrange their businesses and even eliminate themselves as employers." *Wiley*, 376 U. S., at 549. An employer's ability to compete in his market is affected, of course, by the terms of whatever collective-bargaining agreement he negotiates with the representative of his employees. Aside from the direct influence on price brought about by the terms of a collective-bargaining agreement, the collective-bargaining process itself presents a certain cost factor that may affect competition between employers in the market.[5] The national commitment to collective bar-

[5] The General Accounting Office has recognized that bidders for a cost-plus-fee subcontract to NASA, who dealt with different

gaining embodied in the Labor Management Relations Act either requires or permits many of these constraints. But quite reasonable expectations of the employees in a particular collective-bargaining unit may be disappointed by a voluntary change in the condition of the employer that is quite incapable of being remedied by any rational application of the successorship doctrine. An employer is free to cease doing business, even though he chooses to do so wholly because of anti-union animus. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965). An employer may adamantly refuse, at the expiration of the period covered by a collective-bargaining agreement, to again consent to a particular term of the agreement that the employees regarded as significant. *NLRB* v. *American National Insurance Co.*, 343 U. S. 395 (1952). These examples of permissible employer conduct for which the Labor Management Relations Act provides no remedy, notwithstanding that the conduct results in the disappointment of legitimate expectations of employees, suggest that the successorship principle, like every other principle of law, has limits beyond which it may not be expanded.

Wiley, supra, speaks in terms of a change in the "ownership or corporate structure of an enterprise" as bringing into play the obligation of the successor employer to perform an obligation voluntarily undertaken by the predecessor employer. But while the principle enunciated in *Wiley* is by no means limited to the corporate merger situation present there, it cannot logically be extended to a mere naked shifting of a group of employees from one employer to another without totally disregarding the basis for the doctrine. The notion of a change in the

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unions, could be evaluated by NASA on the basis of varying costs that collective bargaining itself might generate. 76 Lab. Rel. Rep. 230 (1971).

"ownership or corporate structure of an enterprise" connotes at the very least that there is continuity in the enterprise, as well as change; and that that continuity be at least in part on the employer's side of the equation, rather than only on that of the employees. If we deal with the legitimate expectations of employees that the employer who agreed to the collective-bargaining contract perform it, we can require another employing entity to perform the contract only when he has succeeded to some of the tangible or intangible assets by the use of which the employees might have expected the first employer to have performed his contract with them.

Phrased another way, the doctrine of successorship in the federal common law of labor relations accords to employees the same general protection against transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to nonlabor-related claimants against the same entity. Nonlabor-related claimants in such transfer situations may be protected not only by assumption agreements resulting from the self-interest of the contracting parties participating in a merger or sale of assets but also by state laws imposing upon the successor corporation of any merger the obligations of the merged corporation (see, *e. g.*, § 90 of the N. Y. Stock Corp. Law (1951), cited in *Wiley*, *supra*), and by bulk sales acts found in numerous States.[6] These latter are designed to give the nonlabor-related creditor of the predecessor entity some claim, either as a matter of contract right against the successor, or as a matter of property right to charge the assets that pass from the predecessor to the successor. The implication of *Wiley* is that the federal common law of labor relations accords the same general type and degree of protection to employees claiming under a collective-bargaining contract.

[6] Uniform Commercial Code §§ 6–101 to 6–111.

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Cases from the courts of appeals have found successorship, consistently with these principles, where the new employer purchases a part or all of the assets of the predecessor employer, *NLRB* v. *Interstate 65 Corp.*, 453 F. 2d 269 (CA6 1971); where the entire business is purchased by the new employer, *NLRB* v. *McFarland*, 306 F. 2d 219 (CA10 1962); and where there is merely a change in the ownership interest in a partnership that operates the employing entity, *NLRB* v. *Colten*, 105 F. 2d 179 (CA6 1939). Other courts of appeals have, equally consistently with these principles, refused to find successorship where there have been no contractual dealings between the two employers, and all that has taken place is a shift in employees. *Tri State Maintenance Corp.* v. *NLRB*, 132 U. S. App. D. C. 368, 408 F. 2d 171 (1968); *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C. 239, 414 F. 2d 1135 (1969).[7]

The rigid imposition of a prior-existing labor relations environment on a new employer whose only connection with the old employer is the hiring of some of the latter's employees and the performance of some of the work which was previously performed by the latter, might well tend to produce industrial peace of a sort. But industrial peace in such a case would be produced at a sacrifice of the determination by the Board of the appropriateness of bargaining agents and of the wishes of the majority of the employees which the Act was designed to preserve. These latter principles caution us against extending successorship, under the banner of

[7] A finding of successorship has been upheld, on the other hand, by one court of appeals where there were no contractual dealings between the two employers, and the successor employer merely replaced the predecessor as a successful bidder for a transit franchise. *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F. 2d 1025 (CA7 1969).

industrial peace, step by step to a point where the only connection between the two employing entities is a naked transfer of employees. Justice Holmes in *Hudson Water Co.* v. *McCarter,* 209 U. S. 349, 355 (1908), summarized the general problem this way:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

Burns acquired not a single asset, tangible or intangible, by negotiation or transfer from Wackenhut. It succeeded to the contractual rights and duties of the plant protection service contract with Lockheed, not by reason of Wackenhut's assignment or consent, but over Wackenhut's vigorous opposition. I think the only permissible conclusion is that Burns is not a successor to Wackenhut. Following its decision in this case, the Board concluded in *Lincoln Private Police,* 189 N. L. R. B. No. 103 (1971), that an employer of guards was not a successor, saying:

> "Respondent, moreover, has operated as an entirely new and independent business enterprise. It obtained its own operating capital, purchased new uniforms, vehicles, and equipment, and occupied different premises than Industrial. Additionally, there is no indication that there has been any carryover of supervisory personnel from Industrial to Respondent." 189 N. L. R. B., at —.

See also *Tri State Maintenance Corp.* v. *NLRB, supra.*

To conclude that Burns was a successor to Wackenhut in this situation, with its attendant consequences under the Board's order imposing a duty to bargain with the

bargaining representative of Wackenhut's employees, would import unwarranted rigidity into labor-management relations. The fortunes of competing employers inevitably ebb and flow, and an employer who has currently gained production orders at the expense of another may well wish to hire employees away from that other. There is no reason to think that the best interests of the employees, the employers, and ultimately of the free market are not served by such movement. Yet inherent in the expanded doctrine of successorship that the Board urges in this case is the notion that somehow the "labor relations environment" comes with the new employees if the new employer has but obtained orders or business that previously belonged to the old employer. The fact that the employees in the instant case continued to perform their work at the same situs, while not irrelevant to analysis, cannot be deemed controlling. For the rigidity that would follow from the Board's application of successorship to this case would not only affect competition between Wackenhut and Burns, but would also affect Lockheed's operations. In effect, it would be saddled, as against its competitors, with the disadvantageous consequences of a collective-bargaining contract unduly favorable to Wackenhut's employees, even though Lockheed's contract with Wackenhut was set to expire at a given time. By the same token, it would be benefited, at the expense of its competitors, as a result of a "sweetheart" contract negotiated between Wackenhut and its employees. From the viewpoint of the recipient of the services, dissatisfaction with the labor relations environment may stimulate a desire for change of contractors. *E. g., Tri State Maintenance Corp.* v. *NLRB, supra;* 76 Lab. Rel. Rep. 230 (1971). Where the relation between the first employer and the second is as attenuated

as it is here, and the reasonable expectations of the employees equally attenuated, the application of the successorship doctrine is not authorized by the Labor Management Relations Act.

This is not to say that Burns would be unilaterally free to mesh into its previously recognized Los Angeles County bargaining unit a group of employees such as were involved here who already have designated a collective-bargaining representative in their previous employment. Burns' actions in this regard would be subject to the commands of the Labor Management Relations Act, and to the regulation of the Board under proper application of governing principles. The situation resulting from the addition of a new element of the component work force of an employer has been dealt with by the Board in numerous cases, and various factors are weighed in order to determine whether the new workforce component should be itself a separate bargaining unit, or whether the employees in this component shall be "accreted" to the bargaining unit already in existence. See, *e. g., NLRB* v. *Food Employers Council, Inc.*, 399 F. 2d 501 (CA9 1968); *Northwest Galvanizing Co.*, 168 N. L. R. B. 26 (1967). Had the Board made the appropriate factual inquiry and determinations required by the Act, such inquiry might have justified the conclusion that Burns was obligated to recognize and bargain with the union as a representative of its employees at the Lockheed facility.

But the Board, instead of applying this type of analysis to the union's complaints here, concluded that because Burns was a "successor" it was absolutely bound to the mold that had been fashioned by Wackenhut and its employees at Lockheed. Burns was thereby precluded from challenging the designation of Lockheed as an appropriate bargaining unit for a year after the original certification. 61 Stat. 144, 29 U. S. C. § 159 (c)(3).

I am unwilling to follow the Board this far down the successorship road, since I believe to do so would substantially undercut the principle of free choice of bargaining representatives by the employees and designation of the appropriate bargaining unit by the Board that are guaranteed by the Act.

UNITED STATES *v.* BISWELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 71–81. Argued March 28, 1972—Decided May 15, 1972

Warrantless search of locked storeroom during business hours as part of inspection procedure authorized by § 923 (g) of the Gun Control Act of 1968, which resulted in the seizure of unlicensed firearms from a dealer federally licensed to deal in sporting weapons *held* not violative of Fourth Amendment. Pp. 311–317.

442 F. 2d 1189, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 317. DOUGLAS, J., filed a dissenting opinion, *post*, p. 317.

R. Kent Greenawalt argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Jerome M. Feit, Beatrice Rosenberg,* and *Kirby W. Patterson.*

Warren F. Reynolds argued the cause and filed a brief for respondent.

John S. Edmunds and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Gun Control Act of 1968, 82 Stat. 1213, 18 U. S. C. § 921 *et seq.*, authorizes official entry during business hours into "the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . at

such premises." [1] 18 U. S. C. § 923 (g). Respondent, a pawn shop operator who was federally licensed to deal in sporting weapons, was visited one afternoon by a city policeman and a Federal Treasury agent who identified himself, inspected respondent's books, and requested entry into a locked gun storeroom. Respondent asked whether the agent had a search warrant, and the investigator told him that he did not, but that § 923 (g) authorized such inspections. Respondent was given a copy of the section to read and he replied, "Well, that's what it says so I guess it's okay." Respondent unlocked the storeroom, and the agent found and seized two sawed-off rifles which respondent was not licensed to possess. He was indicted and convicted for dealing in firearms with-

[1] "Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary [of the Treasury] may by regulations prescribe. Such importers, manufacturers, dealers, and collectors shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises. Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition." 18 U. S. C. § 923 (g).

out having paid the required special occupational tax.[2] The Court of Appeals reversed, however, holding that § 923 (g) was unconstitutional under the Fourth Amendment because it authorized warrantless searches of business premises and that respondent's ostensible consent to the search was invalid under *Bumper* v. *North Carolina*, 391 U. S. 543 (1968). The Court of Appeals concluded that the sawed-off rifles, having been illegally seized, were inadmissible in evidence. 442 F. 2d 1189 (CA10 1971). We granted certiorari, 404 U. S. 983 (1971), and now reverse the judgment of the Court of Appeals.

As the Court of Appeals correctly recognized, we had no occasion in *See* v. *City of Seattle*, 387 U. S. 541 (1967), to consider the reach of the Fourth Amendment with respect to various federal regulatory statutes. In *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), we dealt with the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. There, federal inspectors, without a warrant

[2] Respondent was licensed under 18 U. S. C. § 923 to sell certain sporting weapons as defined in 18 U. S. C. § 921. The sawed-off rifles, however, fell under 26 U. S. C. § 5845's technical definition of "firearms," and every dealer in such firearms was required by 26 U. S. C. § 5801 to pay a special occupational tax of $200 a year. Such firearms are also required to be registered to a dealer in the National Firearms Registration and Transfer Record. 26 U. S. C. § 5841. Respondent was indicted on six counts. Count I, on which he was convicted, charged that he had "wilfully and knowingly engaged in business as a dealer in firearms, as defined by 26 U. S. C. 5845 . . . without having paid the special (occupational) tax required by 26 U. S. C. 5801 for his business." Counts II–V, on which he was acquitted, charged that he had possessed certain firearms that were not identified by serial number, as required by 26 U. S. C. § 5842, and that were not registered in the National Firearms Registration and Transfer Record, as required by 26 U. S. C. § 5841. Count VI, which charged respondent with failing to maintain properly the records required under 18 U. S. C. § 923, was severed and is awaiting trial.

and without the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. Emphasizing the historically broad authority of the Government to regulate the liquor industry and the approval of similar inspection laws of this kind in *Boyd* v. *United States*, 116 U. S. 616 (1886),[3] we concluded that Congress had ample power "to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U. S., at 76. We found, however, that Congress had not expressly provided for forcible entry in the absence of a warrant and had instead given Government agents a remedy by making it a criminal offense to refuse admission to the inspectors under 26 U. S. C. § 7342.

Here, the search was not accompanied by any unauthorized force, and if the target of the inspection had been a federally licensed liquor dealer, it is clear under *Colonnade* that the Fourth Amendment would not bar a seizure of illicit liquor. When the officers asked to inspect respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on

[3] "The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. . . . [I]n the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment." 116 U. S., at 623–624 (footnote omitted).

notice as to their identity and the legal basis for their action. Respondent's submission to *lawful* authority and his decision to step aside and permit the inspection rather than face a criminal prosecution [4] is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all. In this context, *Bumper* v. *North Carolina*, 391 U. S. 543 (1968), is inapposite, since there the police relied on a warrant that was never shown to be valid; because their demand for entry was not pursuant to lawful authority, the acquiescence of the householder was held an involuntary consent. In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

We think a like result is required in the present case, which involves a similar inspection system aimed at federally licensed dealers in firearms. Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. See Congressional Findings and Declaration, Note preceding 18 U. S. C. § 922. Large interests are at stake, and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in

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[4] Congress has made it a crime to violate any provision of the Gun Control Act. 18 U. S. C. § 924.

a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms.

It is also apparent that if the law is to be properly enforced and inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment. In *See* v. *City of Seattle*, 387 U. S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue. We expressly refrained in that case from questioning a warrantless regulatory search such as that authorized by § 923 of the Gun Control Act. Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. 18 U. S. C. § 921 (a)(19). The dealer is not left to wonder about the purposes of the inspector or the limits of his task.

We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute. The seizure of respondent's sawed-off rifles was not unreasonable under the Fourth Amendment, and the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BLACKMUN, concurring in the result.

Had I been a member of the Court when *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72 (1970), was decided, I would have joined the respective dissenting opinions of Mr. Justice Black and of THE CHIEF JUSTICE, 397 U. S., at 79 and 77. I therefore concur in the result here.

MR. JUSTICE DOUGLAS, dissenting.

As Mr. Justice Clark, writing for the three-judge panel in the Court of Appeals for the Tenth Circuit said, the Federal Gun Control Act, 18 U. S. C. § 923 (g), has a provision for inspection that is "almost identical" with the one in *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72.

The present one provides:

> "The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition . . . dealer . . . for the purpose of inspecting or examining (1) any records or documents required to be kept . . . and (2) any firearms or ammunition kept or stored by such . . . dealer . . . ." 18 U. S. C. § 923 (g).

The one in *Colonnade* provided:

> "The Secretary or his delegate may enter during business hours the premises . . . of any dealer for the purpose of inspecting or examining any records or other documents required to be kept . . . under this chapter . . . ." 26 U. S. C. § 5146 (b).

The Court legitimates this inspection scheme because of its belief that, had respondent been a dealer in liquor instead of firearms, such a search as was here undertaken would have been valid under the principles of *Colonnade*. I respectfully disagree. *Colonnade*, of course, rested heavily on the unique historical origins of governmental regulation of liquor. And the Court admits that similar regulation of the firearms traffic "is not as deeply rooted in history as is governmental control of the liquor industry." Yet, assuming, *arguendo*, that the firearms industry is as appropriate a subject of pervasive governmental inspection as is the liquor industry, the Court errs.

In *Colonnade*, we agreed that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." 397 U. S., at 76. But we also said:

> "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Id.*, at 77.

Here, the statute authorizing inspection is virtually identical to the one we considered in *Colonnade*. The conclusion necessarily follows that Congress, as in *Colonnade*, has here "selected a standard that does not include forcible entries without a warrant." *Ibid.*

In my view, a search conducted over the objection of the owner of the premises sought to be searched is "forcible," whether or not violent means are used to effect

the search. In this case, the owner withdrew his objection upon being shown a copy of the statute authorizing inspection, saying: "If that is the law, I guess it is all right." If we apply the test of "consent" that we used in *Bumper* v. *North Carolina*, 391 U. S. 543, we would affirm this judgment,* for as MR. JUSTICE STEWART, speaking for the Court in *Bumper*, said:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.*, at 548–550.

I would affirm the judgment below.

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*The majority concludes that *Bumper* is "inapposite" to this case. *Bumper* holds that an *otherwise invalid* search is not legitimated because of the occupant's consent to a law enforcement officer's assertion of authority. *Bumper* is only "inapposite" if one has already concluded that consent is irrelevant to the validity of the search at issue.

ANDREWS *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-300. Argued March 22, 1972—Decided May 15, 1972

Petitioner, claiming that he was wrongfully discharged from his employment by respondent railroad, filed a state-court action based on state law for breach of contract. The suit was removed to Federal District Court which dismissed the complaint for failure to exhaust the remedies provided by the Railway Labor Act, and the Court of Appeals affirmed. *Held:* Since the source of petitioner's right not to be discharged and of his employer's obligation to restore him to his regular employment following an injury is the collective-bargaining agreement, petitioner must follow the grievance and arbitration procedures set forth in the Railway Labor Act. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, overruled. Pp. 321-326.

441 F. 2d 1222, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 326. POWELL, J., took no part in the consideration or decision of the case.

Andrew W. Estes argued the cause for petitioner. With him on the brief was *James E. Slaton.*

William H. Major argued the cause for respondents. With him on the brief were *Lamar W. Sizemore* and *Robert G. Young.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner brought suit in the state trial court of Georgia seeking damages for alleged "wrongful discharge"

by the respondent.* He alleged that prior to an auto accident in 1967, he had been an employee in good standing of the respondent, employed "under specified conditions and with a stipulated schedule of benefits." He alleged that following the accident, he had fully recovered and was physically able to resume his work for respondent, but that respondent had refused to allow him to return to work, and that respondent's actions amounted to a wrongful discharge. He prayed for damages consisting of loss of past and future earnings and for attorneys' fees. Respondent removed the case to the United States District Court and there moved to dismiss the complaint for failure to exhaust the remedies provided by the § 3 First (i) of the Railway Labor Act, 44 Stat. 579, as amended, 48 Stat. 1191, 45 U. S. C. § 153 First (i). See also 1966 amendments to § 3 Second, 80 Stat. 208. The District Court granted the motion, and the Court of Appeals for the Fifth Circuit affirmed. We granted certiorari, 404 U. S. 955, and are once more confronted with the question of whether *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630 (1941), should be overruled.

Moore held that a railroad employee who elected to treat his employer's breach of the employment contract as a discharge was not required to resort to the remedies afforded under the Railway Labor Act for adjustment and arbitration of grievances, but was free to commence in state court an action based on state law for breach of contract. The result was supported by the Court's conclusion that the procedures for adjustment of "minor

*References throughout the opinion to respondent are to the Georgia Railroad Co., which consisted of properties leased by Louisville & Nashville Railroad Co. and Seaboard Coastline Railroad Co. The petitioner alleged in his complaint that the Georgia Railroad Co. had refused to allow him to return to work.

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disputes" under the Railway Labor Act had been intended by Congress to be optional, not compulsory, and that therefore a State was free to accord an alternative remedy to a discharged railroad employee under its law of contracts. The basic holding of *Moore* was reaffirmed and its state law aspects amplified in *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653 (1953). There it was held that if state law required the employee to exhaust administrative remedies provided for in his contract of employment before resorting to court, a federal diversity court should enforce that requirement.

Later cases from this Court have repudiated the reasoning advanced in support of the result reached in *Moore* v. *Illinois Central, supra.* Fifteen years ago, in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 39 (1957), this Court canvassed the relevant legislative history and said:

> "This record is convincing that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field."

When the issue was again before the Court in *Walker* v. *Southern R. Co.*, 385 U. S. 196 (1966), it was observed:

> "Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act." 385 U. S., at 198.

Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.

The related doctrine expressed in *Moore* and *Koppal*, that a railroad employee's action for breach of an employment contract is created and governed by state law, has been likewise undercut by later decisions. In *Machinists* v. *Central Airlines*, 372 U. S. 682 (1963), an agreement required under § 204 of the Railway Labor Act was said to be "like the Labor Management Relations Act § 301 contract . . . a federal contract and . . . therefore governed and enforceable by federal law, in the federal courts." 372 U. S., at 692. A similar result was reached under § 301 (a) of the Labor Management Relations Act in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957).

In *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965), the Court deduced from the Labor Management Relations Act a preference for the settlement of disputes in accordance with contractually agreed-upon arbitration procedures. It accordingly held that before a state court action could be maintained for breach of such a contract, the employee must first "*attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." 379 U. S., at 652. In *Maddox*, the Court not only refused to extend *Moore* to save state court actions for breach of contract under § 301 of the Labor Management Relations Act, but intimated that its rule might well not survive even in Railway Labor Act cases. Indeed, since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between petitioner and respondent stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the LMRA.

The fact that petitioner characterizes his claim as one for "wrongful discharge" does not save it from the Act's

mandatory provisions for the processing of grievances. Petitioner argues that his election to sever his connection with the employer and treat the latter's alleged breach of the employment contract as a "discharge" renders his claim sufficiently different from the normal disputes over the interpretation of a collective-bargaining agreement to warrant carving out an exception to the otherwise mandatory rule for the submission of disputes to the Board. But the very concept of "wrongful discharge" implies some sort of statutory or contractual standard that modifies the traditional common-law rule that a contract of employment is terminable by either party at will. Here it is conceded by all that the only source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that entitles him to damages, is the collective-bargaining agreement between the employer and the union. Respondent in this case vigorously disputes any intent on its part to discharge petitioner, and the pleadings indicate that the disagreement turns on the extent of respondent's obligation to restore petitioner to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the collective-bargaining agreement. Thus petitioner's claim, and respondent's disallowance of it, stem from differing interpretations of the collective-bargaining agreement. The fact that petitioner intends to hereafter seek employment elsewhere does not make his present claim against his employer any the less a dispute as to the interpretation of a collective-bargaining agreement. His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment.

The constitutional issue discussed in the dissent was not set forth as a "question presented for review" in the

petition for certiorari, and therefore our Rule 23 (1)(c) precludes our consideration of it. "We do not reach for constitutional questions not raised by the parties." *Mazer* v. *Stein,* 347 U. S. 201, 206 n. 5 (1954).

The term "exhaustion of administrative remedies" in its broader sense may be an entirely appropriate description of the obligation of both the employee and carrier under the Railway Labor Act to resort to dispute settlement procedures provided by that Act. It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another. A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. *Union Pacific R. Co.* v. *Price,* 360 U. S. 601 (1959). He is limited to the judicial review of the Board's proceedings that the Act itself provides. *Gunther* v. *San Diego & A. E. R. Co.,* 382 U. S. 257 (1965). In such a case the proceedings afforded by 45 U. S. C. § 153 First (i), will be the only remedy available to the aggrieved party.

In *Walker* v. *Southern R. Co.,* 385 U. S. 196 (1966), the Court noted that there had been complaints not only about the long delay in processing of grievances on the part of the Adjustment Boards, but also about the fact that a more extensive right of judicial review of Board action was accorded to carriers than to employees. The Court noted that Congress, by Public Law 89–456, 80 Stat. 208, effective June 20, 1966, had legislated to correct these difficulties, but observed that the employee in *Walker* had not had the benefit of these new procedures. It therefore declined, "in his case," 385 U. S., at 199, to overrule *Moore.* Petitioner Andrews, however, would in the prosecution of his claim before the Adjustment Board have the benefit of these

improved procedures. We now hold that he must avail himself of them, and in so doing we necessarily overrule *Moore* v. *Illinois Central R. Co., supra.*

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

I

If this employee wanted reinstatement and back pay, there would be merit in remitting him to the remedies under the Railway Labor Act. But he does not want that relief. Rather, he desires to quit the railroad, to have no further jobs with it, and to be compensated in dollars for his wrongful discharge.

The cases on which the Court relies to overrule *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, are quite different. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, involved claims of existing employees, not for damages for wrongful discharge, but for "additional compensation" and for "reinstatement," and involved a "minor" dispute, that is, a controversy "over the meaning of an existing collective bargaining agreement." *Id.*, at 32–33. *Machinists* v. *Central Airlines*, 372 U. S. 682, also involved reinstatement "without loss of seniority and with back pay." *Id.*, at 683. In *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, the aggrieved employee wanted "severance pay" allegedly owed under the collective-bargaining agreement. *Id.*, at 650–651. In *Walker* v. *Southern R. Co.*, 385 U. S. 196, the dispute basically involved an issue of seniority, though the opinion does not disclose it.[1]

[1] The opinion of the Court of Appeals in the *Walker* case makes clear that the seniority dispute was based on the collective agreement. 354 F. 2d 950.

The complaint in this case alleges that following an automobile accident, in which the petitioner-employee was involved, the company refused to allow him to go to work on the ground he had not recovered sufficiently to perform his former duties. No issue involving the collective-bargaining agreement was tendered. Petitioner—rightly or wrongly—claimed this was a discharge and that under Georgia law, governing the place where he worked, he had been deprived of wages from the time he recovered from the accident, and that he was deprived "of the expectancy of future earnings . . . until the date of his scheduled retirement."

In other words, he asks for no relief under the collective agreement, he does not ask for reinstatement or severance pay, he does not ask for continued employment. He is finished with this railroad, and turns to other activities; he seeks no readmission to the collective group that works for the railroad. He leaves it completely and seeks damages for having been forced out.[2]

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[2] The Georgia law of "wrongful discharge" seems to amount to a set of common-law axioms of construction to fill in the ambiguities in employment contracts and employment relationships. If there is a contract, however, which expressly addresses the issue, the contract, and not the construction axioms, controls. For example, unless a contract provides otherwise, disobedience is a ground for discharge, *Georgia Coast & Piedmont R. Co.* v. *McFarland*, 132 Ga. 639, 64 S. E. 897, as is disrespectful language, *Wade* v. *Hefner*, 16 Ga. App. 106, 84 S. E. 598. If the employment contract, whether oral or written, provides that the worker may be fired only if his performance is unsatisfactory, he may not be discharged only for economic necessity, *Lummus Cotton Gin Co.* v. *Baugh*, 29 Ga. App. 498, 116 S. E. 51, although "mitigating factors" may generally be a defense. *Walker* v. *Jenkins*, 32 Ga. App. 238, 123 S. E. 161.

But where the language of the agreement is clear, that language controls and not the rules of construction. Thus, if the parties provide that the employer may fire at will, no discharge can be wrongful. *Webb* v. *The Warren Co.*, 113 Ga. App. 850, 149 S. E. 2d 867.

The general presumption is that hiring is terminable at will,

To remit him to the National Railroad Adjustment Board is to remit him to an agency that has no power to act on this claim. We said as much in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. That case involved a grievance that "concerned interpretation of an existing bargaining agreement." *Id.*, at 242. We therefore held that the employee first had to exhaust his remedies before the Adjustment Board. We distinguished the case from *Moore* as follows:

> "Our holding here is not inconsistent with our holding in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to

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unless some definite period of employment is provided or inferable from the relationship. Ga. Code Ann. §.66–101 (master and servant). The intent of the parties is the guide to determine if the courts may look to custom or the pay interval, if the contract is otherwise ambiguous. *Odom* v. *Bush*, 125 Ga. 184, 53 S. E. 1013. Thus, if the worker is paid monthly, he must be given 30 days' notice.

As to damages, once it is shown that the discharge was wrongful, the measure of damages is the difference between the rate of pay and what the dischargee might have been able to earn in other employment. Ga. Code Ann. § 4–216. The fact that the employer prevented the employee from performing the remainder of the service is not a bar to recovery on that portion of the term. *Irwin* v. *Young*, 91 Ga. App. 773, 87 S. E. 2d 322.

For Andrews to recover on a damages theory, it appears that it would be necessary for him to show first that he was not dischargeable at will. We do not know from the pleadings what proof Andrews will tender. So far as we can now tell the collective agreement is not in issue. His complaint does not state the source of the employer's duty; and respondents allege that the collective agreement creates no such duty. As to damages it is also impossible to say that any terms of the collective agreement will be relevant to this dispute.

be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. *A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide,* and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board." 339 U. S., at 244. (Emphasis added.)

The Adjustment Board has considerable expertise in construing and applying collective-bargaining agreements, as respects severance pay, seniority, disciplinary actions by management, and the various aspects of reinstatement. But the body of law governing the discharge of employees who do not want or seek reinstatement is not found in customs of the shop or in the collective agreement but in the law of the place where the employee works. The Adjustment Board is not competent to apply that law. In the first place the members of the four divisions of the Adjustment Board authorized by 45 U. S. C. § 153 First (b) presumably do not know the local law governing the employee-employer relationships in all of the States where railroads run. In the second place, the personnel of these divisions of the Adjustment Board may occasionally have lawyers on them but law-trained members are the exception, not the rule. In the third place, an employee seeking damages for reinstatement is normally entitled to a jury trial; and no division of the Adjustment Board ever pretends to serve in that role.

The Board, we now know, is made up of laymen; those laymen have no insight into the nuances of Georgia

law on the question of damages, and they obviously cannot even purport to give the remedy in damages which a "court suit" entails.

The regime of mediation and arbitration under collective-bargaining agreements, such as the one we upheld in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, and those we have cited under the Railway Labor Act, are important in stabilizing relations between unions and employers. See *U. S. Bulk Carriers* v. *Arguelles,* 400 U. S. 351, 355–356. But where the collective-bargaining agreement is not directly involved, and certainly where the individual employee, who tenders his grievance, wants to quit the railroad scene and go elsewhere and sever his communal relation with union and railroad, the case falls out of the ambit of authority given to the mediation or arbitration agencies.

The courthouse is the forum for that litigant and I would never close its door to him, unless the mandate of Congress were clear. Even then I do not see how the Seventh Amendment could be circumvented: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

Though the case is in the federal courts, this employee sues to enforce a common-law right recognized by the State of Georgia. The only place he can get a trial by jury is in a court. If he sues under a collective-bargaining agreement, he does not sue at common law but under a statutory federal regime. Yet that is not this case.

Everyone who joins a union does not give up his civil rights. If he wants to leave the commune and assert his common-law rights, I had supposed that no one could stop him. I think it important under our constitutional regime to leave as much initiative as possible to the individual. What the Court does today is ruthlessly

to regiment a worker and force him to sacrifice his constitutional rights in favor of a union. I would give him a choice to pursue such rights as he has under the collective agreement and stay with the union,[3] or to quit it and the railroad and free himself from a regime which he finds oppressive. I would construe the federal law as giving the employee that choice. The choice imposed by the Court today raises serious constitutional questions [4] on which we have not had the benefit of any argument.

This is a plain, ordinary, common-law suit not dependent on any term or provision of a collective-bargaining agreement. I cannot, therefore, join those who would close the courthouse door to him. Under the First Amendment, as applied to the States by the Fourteenth, he is petitioning the Government "for a redress of grievances" in the traditional manner of suitors at common law; and by the Seventh Amendment is entitled to a jury trial.

II

As noted, my basic disagreements with the majority concern the validity of the two assumptions implicit in its holding: (a) that the collective agreement will be sufficiently implicated in this dispute to warrant the application of federal substantive law, and (b) that Congress has vested the Board with jurisdiction to enter-

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[3] The Board is currently disposing of petitions at the rate of about 1,500 annually. At that rate the Board will eliminate its present backlog of slightly more than 3,000 cases in two years. Thirty-Seventh Annual Report of the National Mediation Board 95 (Table 9) (1971).

[4] Constitutional issues not raised by the parties are at times passed upon by the Court. For a notorious example, see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and Butler, J.'s comments, *id.*, at 88–89. See also *Mapp* v. *Ohio*, 367 U. S. 643, 673–677 (Harlan, J., dissenting); *Redrup* v. *New York*, 386 U. S. 767, 771–772 (Harlan, J., dissenting).

tain nonreinstatement grievances such as Andrews' complaint. But, even taking these assumptions as correct for purposes of argument, I believe the Court has erred.

The majority does not hold that Congress has mandated that the statutory procedure be the exclusive route for adjusting Andrews' grievance. Indeed, that path was foreclosed by our decision in *Walker* v. *Southern R. Co.*, 385 U. S. 196, holding that prior to the 1966 amendments Congress had evinced no such purpose, and by the fact that nothing in the 1966 amendments themselves evidences an intention to render the statutory channel exclusive for nonreinstatement claims.[5] Rather, today's result is grounded in the authority of the federal courts to fashion the substantive law to be applied to collective agreements. *Machinists* v. *Central Airlines*, 372 U. S. 682, 695; see also *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448. Even under that assumption, I would not impose the exhaustion requirement upon this narrow and readily identifiable group of dischargees.

There is no equation of the substantive law to govern agreements under § 301 of the Labor Management Relations Act, into which exclusive arbitration clauses may voluntarily be inserted by the parties and the substantive law to govern railroad contracts, onto which the statutory grievance procedure is superimposed by law. One would not suppose that every doctrine developed under the Labor Management Relations Act, 61 Stat. 136, should be carried over into the apparatus created by the Railway Labor Act. A salutary doctrine under one measure may serve no worthwhile purpose under the other. Yet today the majority transplants

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[5] Nothing in the 1966 amendments nor their related legislative history even suggests or hints at a design to overrule *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. See H. R. Rep. No. 1114, 89th Cong., 1st Sess. (1965); S. Rep. No. 1201, 89th Cong., 2d Sess. (1966).

the *Maddox* rule in the foreign soil of the railroad world without any discussion of the ends to be served. Even *Maddox* cautioned against that result, stating that any overruling of *Moore* should come only after "the various distinctive features of the administrative remedies provided by [the Railway Labor] Act can be appraised in context, *e. g.*, the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U. S., at 657 n. 14.

It is said that the fact that Congress (rather than private parties as in *Maddox*) fashioned the instant adjustment procedure somehow reinforces a presumption of exclusivity. Yet it is difficult to perceive how that can be when it is also conceded, as mentioned earlier, that Congress itself has never designed its prescription to be the sole avenue of redress for this limited class of claimants. Rather, the significance of the statutory source of this procedure lies in its inflexibility and immunity from modification through collective bargaining. Unlike the *Maddox* rule, what is done today cannot be undone tomorrow through contract negotiation.[6] That difference would seem to warrant caution to ensure that more is to be gained than lost by closing the courthouse door.

One clear disadvantage counsels against today's holding. Given the nature of permanent dischargees' weak positions *vis-à-vis* their former unions, the personnel manning the adjustment mechanism, its haphazard decisional process, and the absence of judicial review of Board decisions, the risk is substantial that valid com-

[6] It was expressly observed by the majority in *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 657–658, that bargaining parties could avoid the force of that opinion simply by agreeing that arbitration was not the exclusive remedy.

plaints of permanent dischargees such as Andrews will be unfairly treated.

The machinery erected by the Railway Labor Act was not meant to be judicial in nature. Rather, it was designed as an arbitration process in which the union and the carrier occupy opposite sides of a bargaining table. As a substitute for the economic battleground, the process envisions decisionmaking on the basis of strength and accountability to the interests represented. Unions will often press one grievance at the expense of another. If Andrews were a continuing union member perhaps he would receive equal representation. But because the union will not have to answer to him if his claim is lost the union may yield its merit in the logrolling process carried on with management. I now have doubt that the reasoning of *Maddox* was sound insofar as we opined that a union agent will have sufficient interest in faithfully prosecuting the complaint of a former member who "has lost his job and is most likely outside the union door looking in instead of on hand to push for his claim." 379 U. S., at 653 (majority opinion), and 668 (Black, J., dissenting). Indeed, only this Term in *Chemical Workers* v. *Pittsburgh Glass*, 404 U. S. 157, we refused to permit a union to represent nonvoting pensioners, holding that under the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, the company was not required to bargain with respect to pension plans affecting inactive retirees. We reasoned that "the risk cannot be overlooked that union representatives on occasion might see fit to bargain for improved wages or other conditions favoring active employees at the expense of retirees' benefits." [7] *Id.*, at 173.

[7] One commentator on the Act has warned that representation by a union may be a critical factor in obtaining a favorable award: "[A]n individual's efforts will presumably be less effective than that

Beyond the inherent risk of compromise of a dischargee's claim there lie still further obstacles to fair treatment. First, the internal procedures used by the Board are far afield from those normally associated with impartial adjudication. The Board is exempt from the Administrative Procedure Act, § 2 (a)(1), 5 U. S. C. § 551 (1). One account of its *ad hoc* procedures leaves little doubt that before that forum Andrews will have no means of proving his allegations:

> "As the Board has operated in practice, the procedures followed in holding hearings have been quite informal and have differed from the trial-type hearings conducted by other agencies established and maintained by the Federal Government. Disputes are referred to the Adjustment Board by the filing of written submissions. Each submission contains a statement of claim, accompanied by a statement of facts. If the parties can agree, a joint statement of facts is filed; if they cannot agree, separate submissions are filed, stating the facts separately. All submissions are in writing. Parties may be heard in person, by counsel, or by other representatives as they elect. . . . It would be most extraordinary for live testimony to be given by witnesses. There is no requirement that a factual submission or other

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of a union, particularly since the grievance will ultimately be resolved by a board composed in part of representatives of affected unions." Risher, The Railway Labor Act, 12 B. C. Ind. & Com. L. Rev. 51, 72 (1970). The plight of the unionless grievant is more alarming when viewed in light of the unsatisfactory record under the Act: "*The Railway Labor Act is special privilege legislation,* the product of the once great political power of the railroad unions. It has been administered as such. This accounts for the dismal administrative records of the National Mediation Board and the National Railroad Adjustment Board in . . . protection of individual rights, and grievance adjustments." Northrup, Foreword to Risher, The Railway Labor Act, *supra,* at 52.

written statement be sworn. There is no cross-examination of witnesses and no record or transcript of the proceedings. There is no provision for issuance of subpenas or compulsory attendance of witnesses." Hearing on H. R. 706 [1966 Railway Labor Act amendments] before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Cong., 2d Sess., 49 (1966).

All of this might be made tolerable if at some point in his journey Andrews could look forward to a judge's inquiry into the affair. But the fact is that whatever order by whatever process the Board may enter will be virtually immune from any judicial review because an award, either of the Adjustment Board or of a special board, is reviewable only for fraud or for lack of jurisdiction. 45 U. S. C. § 153 (p) (proviso).

On the other side of the balance, it could not be claimed that permitting a judicial remedy (in addition to an administrative one) would risk economic warfare, especially in light of the estranged relationship of permanent dischargees to their former unions. Nor could it be claimed that a judicial remedy would risk nonuniformity in interpretation of collective agreements inasmuch as courts as well as the Board would be obliged to apply a single body of federal common law. See *Maddox, supra,* at 658 n. 15.

In summary, the danger of unfair treatment of the clearly identifiable class of dischargees represented by Andrews is so great, without any compensating advantages, that I would not confine these claimants to the administrative remedy.

HUFFMAN *v.* BOERSEN

CERTIORARI TO THE SUPREME COURT OF NEBRASKA

No. 71–5097. Argued April 19, 1972—Decided May 15, 1972

Judgment dismissing indigent petitioner's appeal for failure to deposit cash or security for costs required of appellants vacated to afford the state court an opportunity for reconsideration in the light of supervening legislation enacted after certiorari was granted.

Vacated and remanded.

Leo Eisenstatt, by appointment of the Court, 404 U. S. 998, argued the cause and filed briefs for petitioner.

Vincent L. Dowding argued the cause and filed a brief for respondent.

PER CURIAM.

We granted certiorari to review the constitutionality of Neb. Rev. Stat. § 25–1914 (1964) [1] under which the Nebraska Supreme Court dismissed this indigent petitioner's appeal for his failure to deposit the $75 cash or bond security for costs required of appellants by the statute. 404 U. S. 990 (1971). The judgment appealed from annulled petitioner's marriage to respondent and dismissed his countersuit claiming paternity and custody of a child born to respondent. After our grant of certiorari, Nebraska enacted Legislative Bill 1120 providing, among other things, that the Nebraska courts "shall authorize . . . [an] appeal . . . without pre-

[1] "On appeal in any case taken from the district court to the Supreme Court the appellant . . . shall, within one month next after the rendition of the judgment or decree . . . sought to be reversed, vacated or modified, . . . file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him in the Supreme Court; or, in lieu thereof, shall make a cash deposit with said clerk of at least seventy-five dollars for the same purpose . . . ."

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payment of . . . security, by a person who makes an affidavit that he is unable to . . . give security . . . ," except that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." Counsel for both parties were of the opinion on oral argument here that this new statute is applicable to the instant case. Counsel for respondent also conceded that petitioner's appeal on the paternity issue has merit.[2] Accordingly, the judgment is vacated and the cause remanded to the Nebraska Supreme Court for reconsideration in light of the supervening statute.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

While I agree to either reversing the judgment below or vacating and remanding, I do so on somewhat different grounds.

This case is clearly controlled by *Boddie* v. *Connecticut*, 401 U. S. 371. It involves, not a divorce, but an annulment and a claim concerning the paternity and custody of a child. The principles announced in *Boddie* are therefore clearly applicable no matter how closely *Boddie* is confined.[1]

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[2] "Q. You told us today that you concede that the determination of the paternity question was insufficient, invalid I think is the word you used.

"Mr. Dowding. Yes, I'm willing to agree that [petitioner] did not have his day in court on the paternity issue.

"Q. And we could say so on a remand.

"Mr. Dowding. Yes. So stipulate." Tr. of Oral Arg. 40.

[1] I share the view of Justice Black, however, that:

"[T]he decision in *Boddie* v. *Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney. . . .

. . . . . .

What the Supreme Court of Nebraska may do about the statute that has recently been enacted is its business and not ours. The parties before us cannot by their agreement make that statute applicable. Only the Supreme Court of Nebraska can do so, and we cannot direct that court to reconsider this case in light of the supervening statute.[2] The Supreme Court of Nebraska is sovereign in its own right in connection with local law matters. *Boddie* contains the guiding federal principle and that principle alone should control the disposition that we make of the case.[3]

"[T]he crucial foundation on which *Boddie* rests also forbids denial of an indigent's right of appeal in civil cases merely because he is too poor to pay appeal costs. Once the right to unhampered access to the judicial process has been established, that right is diluted unless the indigent litigant has an opportunity to assert and obtain review of the errors committed at trial." *Meltzer* v. *LeCraw & Co.*, 402 U. S. 954, 955–956, 958 (opinion of Black, J.).

[2] Some States do have procedures by which federal appellate courts may certify questions of law to the state supreme court. Florida is one. See *Diffenderfer* v. *Central Baptist Church*, 404 U. S. 412, 415 (DOUGLAS, J., dissenting). Nebraska has no such procedure.

[3] It is possible that the Nebraska Supreme Court will have no opportunity, despite the remand, to rule on the applicability of the new statute to petitioner. Legislative Bill 1120 provides that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith." In the federal system, "good faith" has "been defined as a requirement that an appeal present a nonfrivolous question for review." *Cruz* v. *Hauck*, 404 U. S. 59, 62 (DOUGLAS, J., concurring). Here, respondent urges strenuously that the annulment issue is indeed frivolous. While counsel is willing to stipulate that there is merit to the paternity issue, the effect of such a stipulation on the views of the trial judge, who is on record as believing petitioner's assertions to be "wholly without merit," App. 49, is highly speculative.

Should petitioner's *in forma pauperis* appeal be disallowed because of the trial court's certification of the appeal as frivolous, I would hold that petitioner had been denied the equal protection of the laws. *Cruz* v. *Hauck*, *supra*.

ATLANTIC COAST LINE RAILROAD CO. *v.* ERIE LACKAWANNA RAILROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-107. Argued April 17-18, 1972—Decided May 15, 1972

442 F. 2d 694, affirmed. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282.

Devereux Milburn argued the cause for petitioner. With him on the briefs were *Louis L. Stanton, Jr.*, *Jerome L. Getz*, and *Frank G. Kurka.*

E. Barrett Prettyman, Jr., argued the cause for respondents. With him on the brief for respondent Erie Lackawanna Railroad Co. were *Timothy J. Bloomfield* and *Lloyd W. Roberson.*

PER CURIAM.

We granted certiorari to review the judgment of the Court of Appeals for the Second Circuit, 442 F. 2d 694 (1971), affirming the judgment of the District Court for the Southern District of New York, 315 F. Supp. 357 (1970). 404 U. S. 909 (1971). We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third-party complaint for contribution against respondent Erie on the authority of *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (1952). The judgment of the Court of Appeals is therefore

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

STRAIT *v.* LAIRD, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–83. Argued March 22, 1972—Decided May 22, 1972

District Court for the Northern District of California has jurisdiction under 28 U. S. C. § 2241 (c) (1) to hear and determine the habeas corpus application of petitioner, who was on unattached, inactive Army reserve duty while domiciled in California, where military authorities processed his application for conscientious objector discharge, though he was under the nominal command of the commanding officer of the Reserve Officer Components Personnel Center in Indiana. *Schlanger* v. *Seamans*, 401 U. S. 487, distinguished. Pp. 342–346.

445 F. 2d 843, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which STEWART WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in Part I of which BURGER, C. J., and BRENNAN and POWELL, JJ., joined, *post*, p. 346.

John T. Hansen argued the cause for petitioner. With him on the briefs were *Melvin L. Wulf*, *Michael N. Pollet*, and *Paul Halvonik*.

Solicitor General Griswold argued the cause for respondents. With him on the brief were *Assistant Attorney General Mardian*, *Wm. Terry Bray*, and *Robert L. Keuch*.

Stanley F. Farrar filed a brief for the Central Committee for Conscientious Objectors et al. as *amici curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner is an Army Reserve officer not on active duty. His active-duty obligations were deferred while

he went to law school after graduating from college. During the period of deferment and at the time this action was commenced, his military records were kept at Fort Benjamin Harrison, Indiana. His nominal commanding officer was the Commanding Officer of the Reserve Officer Components Personnel Center at Fort Benjamin Harrison. Petitioner was, however, at all times domiciled in California and was never in Indiana or assigned there. On finishing law school he took the California Bar examination and on March 5, 1970, he was ordered to report for active duty at Fort Gordon, Georgia, beginning Ap[illegible] 13, 1970. Before that time, however, he had filed an application for discharge as a conscientious objector. That application was processed at Fort Ord, California, where hearings were held. Fort Ord recommended his discharge and review of that recommendation was had in Indiana. The result was disapproval of the application.

Petitioner thereupon filed a petition for writ of habeas corpus in California. The District Court denied a motion to dismiss, holding that it had jurisdiction (3 S. S. L. R. 3152), but ruled against petitioner on the merits. On appeal the Court of Appeals agreed with the District Court as to jurisdiction but disagreed with it on the merits and granted the writ. 3 S. S. L. R. 3784. Shortly thereafter our decision in *Schlanger* v. *Seamans*, 401 U. S. 487, was announced. Thereupon the Court of Appeals granted a petition for rehearing and dismissed the action, holding that the District Court had no jurisdiction under the habeas corpus statutes. 445 F. 2d 843. The case is here on a petition for certiorari, which we granted. We reverse the judgment below.

In *Schlanger* the serviceman—on active duty in the Air Force—was studying in Arizona on assignment from Ohio. There was no officer in Arizona who was his

custodian or one in his chain of command, or one to whom he was to report. While the Habeas Corpus Act extends to those "in custody under or by color of the authority of the United States," 28 U. S. C. § 2241 (c)(1), we held in *Schlanger* that the presence of the "custodian" within the territorial jurisdiction of the District Court was a *sine qua non*. In *Schlanger* the only "custodian" of the serviceman was in Moody AFB, Georgia. While there were army officers in Arizona, there were none to whom the serviceman was reporting and none who were supervising his work there, though he was on active duty. Moreover, the serviceman in that case was in Arizona only temporarily for an educational project.

In the present case California is Strait's home. He was commissioned in California. Up to the controversy in the present case he was on reserve duty, never on active duty, and while he had gone east for graduate work in law, California had always been his home. Fort Ord in California was where his application for conscientious objector discharge was processed and where hearings were held. It was in California where he had had his only meaningful contact with the Army; and his superiors there recommended his discharge as a conscientious objector.

Thus, the contention in the dissent that we "abandon *Schlanger*" by the approach we take today is incorrect. Sergeant Schlanger was on permissive temporary duty. While his stay in Arizona was thus not charged to his leave time, it was primarily for his own benefit,[1] he paid

[1] At the time Sergeant Schlanger received his assignment, Air Force Regulation 35-26 (Mar. 6, 1968) defined "permissive temporary duty" as "duty of a quasi-official nature performed at other than the permanent duty station, without costs to the Government for per diem and travel." So defined, primary difference between "leave" and "permissive temporary duty" appears to be that

his own expenses, and he was as much on his own as any serviceman on leave. We held in *Schlanger* that, while an active-duty serviceman in such a status might be in military "custody," see *Donigian* v. *Laird*, 308 F. Supp. 449 (Md. 1969), his custodian may not be deemed present wherever the serviceman has persuaded the service to let him go. The jurisdictional defect in *Schlanger*, however, was not merely the physical absence of the Commander of Moody AFB from the District of Arizona, but the total lack of formal contacts between Schlanger and the military in that district.

Strait's situation is far different. His nominal custodian, unlike Schlanger's, has enlisted the aid and directed the activities of armed forces personnel in California in his dealings with Strait. Indeed, in the course of Strait's enlistment, virtually every face-to-face contact between him and the military has taken place in California. In the face of this record, to say that Strait's custodian is amenable to process only in Indiana—or wherever the Army chooses to locate its recordkeeping center, see n. 3, *infra*—would be to exalt fiction over reality.

In a closely parallel case the Court of Appeals for the Second Circuit held that an unattached reserve officer who lived in New York and whose application for discharge as a conscientious objector was processed in New York could properly file for habeas corpus in New York, even though the commanding officer of the reservists was in Fort Benjamin Harrison, Indiana. *Arlen* v. *Laird*, 451 F. 2d 684. The court held that the only contacts the serviceman had had with his commanding officer were through the officers he dealt with in New York. Those contacts, it concluded, were sufficient to give the

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the latter status requires the serviceman to convince the military that his proposed activity, while away from his permanent duty station, would be of some direct or indirect benefit to the service.

commanding officer "presence" in New York. It concluded:

> "Quite unlike a commanding officer who is responsible for the day to day control of his subordinates, the commanding officer of the Center is the head of a basically administrative organization that merely keeps the records of unattached reservists. To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for *habeas corpus* purposes only within one small geographical area is to ignore reality." *Id.*, at 687.

We agree with that view. Strait's commanding officer is "present" in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge.[2] To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience. It "would result in a concentration of similar cases in the district in which the Reserve Officer Components Personnel Center is located." *Donigian* v. *Laird*, 308 F. Supp., at 453.[3] The concepts of "custody" and "custodian" are

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[2] That such "presence" may suffice for personal jurisdiction is well settled, *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220; *Int'l Shoe Co.* v. *Washington*, 326 U. S. 310, and the concept is also not a novel one as regards habeas corpus jurisdiction. In *Ex parte Endo*, 323 U. S. 283, 307, we said that habeas corpus may issue "if a respondent who has custody of the prisoner is within reach of the court's process . . . ." Strait's commanding officer is "present" in California through his contacts in that State; he is therefore "within reach" of the federal court in which Strait filed his petition. See *Donigian* v. *Laird*, 308 F. Supp. 449, 453; cf. *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471, 475.

[3] This concentration would be exacerbated in the extreme by the fact that the Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, has now been moved to St. Louis,

sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction.

We intimate no opinion on the merits of the controversy—whether petitioner is entitled to a discharge or whether by denying that relief the Army has acted in accordance with the prescribed procedures. We hold only that there is jurisdiction under 28 U. S. C. § 2241 (c)(1) for consideration of this habeas corpus petition and for decision on the merits.

Reversed.

MR. JUSTICE REHNQUIST, dissenting.

The Court today emasculates *Schlanger* v. *Seamans*, 401 U. S. 487 (1971), by permitting habeas corpus when the custodian against whom the writ must run is not within the forum judicial district. It stretches the concept of custody beyond anything contained in any of our previous decisions, and permits the federal courts through habeas corpus to exercise broader review of military administration than has ever been permitted. I therefore dissent.

I

The facts of this case are indistinguishable in any material respect from *Schlanger* v. *Seamans*, *supra*. Petitioner was assigned to the Reserve Officer Components Personnel Center at Fort Benjamin Harrison, Indiana. His dealings with the Army consisted of several requests for delay in commencing active duty, all of which were addressed to and granted by his com-

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Missouri, and has been there merged into the United States Army Reserve Components Personnel and Administration Center (RCPAC). RCPAC has recordkeeping and nominal administrative responsibility for approximately 2,000,000 servicemen, all unattached, inactive reservists such as petitioner.

manding officer at Fort Benjamin Harrison, and an application for discharge as a conscientious objector, which was also submitted to the Indiana command. Although petitioner was interviewed by a chaplain, psychiatrist, and another Army officer at Fort Ord, California, each of whom made recommendations about petitioner's application, petitioner was not subject to military orders from any command in California nor did any California command rule upon his application. The preliminary processing accomplished by the interviews was forwarded to petitioner's commanding officer at Fort Benjamin Harrison, who convened a review board to pass upon the application. Following the board's recommendation, petitioner's commanding officer denied the requested discharge. Nothing in the record before us indicates that petitioner has ever been subject to the orders of any Army officer or command in California. What little control the Army imposed upon petitioner emanated from his commanding officer in Indiana.

Only last Term, this Court held in *Schlanger*, that a district court has jurisdiction to issue a writ of habeas corpus under 28 U. S. C. § 2241, to a military custodian, only where a commanding officer or other custodian in the chain of command is found within the judicial district. Because Schlanger had been assigned to a command in Georgia, and no official in Arizona controlled his activities, the District Court of Arizona had no habeas jurisdiction. Attempting to reconcile *Schlanger* with this case, the Court today says:

> "In *Schlanger* the only 'custodian' of the serviceman was in Moody AFB, Georgia. While there were army officers in Arizona, there were none to whom the serviceman was reporting and none who were supervising his work there, though he was on active duty. Moreover, the serviceman in

that case was in Arizona only temporarily for an educational project.

"In the present case California is Strait's home. He was commissioned in California. Up to the controversy in the present case he was on reserve duty, never on active duty, and while he had gone east for graduate work in law, California had always been his home. Fort Ord in California was where he processed his application for conscientious objector discharge and where hearings were held. It was in California where he had had his only meaningful contact with the Army; and his superiors there recommended his discharge as a conscientious objector." *Ante,* at 343.

But there were no officers in California to whom this petitioner was reporting, and "none who were supervising his work there." His control by the Army has heretofore consisted only of requests for delayed commencement of active duty, and for discharge. All such requests were addressed to and decided by his commanding officer in Indiana. His "meaningful contact" with the Army was not in California, but Indiana. His interviews with staff officers at Fort Ord neither constituted them "superiors" nor did it bring them within petitioner's chain of command. No officer or command in California had authority to provide the relief requested by petitioner. Under the principle enunciated in *Schlanger,* the Northern District of California lacked jurisdiction to issue habeas corpus for want of a custodian within the district. Emphasizing that petitioner brought this habeas corpus suit in the district where his home is cannot cure that defect, cf. *Rudick* v. *Laird,* 412 F. 2d 16 (CA2 1969). We deal not with the provisions of a venue statute, but with the established requirement that the petitioner's custodian be within the

district. Petitioner's presence in his home State to take the bar examination, after a three-year absence while attending law school, affords him no more support than did Schlanger's presence in Arizona.

The Court substitutes the approach of *Arlen* v. *Laird*, 451 F. 2d 684 (CA2 1971), for its *Schlanger* rule. *Arlen*, incorrectly concluding that *Schlanger* reserved the question presented here,[1] held that the type of contacts between the commanding officer and a reservist that have been found to support state jurisdiction over nonresidents under cases like *McGee* v. *Int'l Life Ins. Co.*, 355 U. S. 220 (1957), and *Int'l Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), would also suffice for habeas jurisdiction. To adopt *Arlen* is to abandon *Schlanger*. But the reasons given by the Second Circuit in *Arlen* do not support a result in that case different from *Schlanger*. *Arlen* noted that Government counsel were adequately available in any judicial district, and the records could be forwarded from petitioner's command to the forum district. The same could have been said of *Schlanger*. Moreover, the Government can assert that Indiana would be the appropriate forum, for the actions of which petitioner complains were taken by the commanding officer and his advisory board at Fort Benjamin Harrison and presumably the proper witnesses for this litigation were there. These factors would be appropriately considered in a determination as to venue or *forum non conveniens* but they are not a substitute for the actual presence of a custodian, which *Schlanger* held was required by statute.

[1] "The Supreme Court reserved decision on this precise question, 401 U. S., at 489, 491 n. 5 . . . and cited, apparently with approval, Donigian v. Laird, 308 F. Supp. 449 (D. Md. 1969)," 451 F. 2d, at 686. But the cited portions of *Schlanger* dealt only with the question of custody, and not with the separate jurisdictional requirement that a custodian be present within the judicial district.

II

While I am satisfied that the Ninth Circuit correctly applied *Schlanger* and ordered dismissal of the habeas corpus petition for want of a custodian within the district, the analysis of the Court in reaching the opposite conclusion highlights what is for me the more substantial issue of whether petitioner was in the custody of anyone.

The Court believes that petitioner's commanding officer was merely a record center, and says that the realistic approach is to rule that such a record center is present in all States where there are reservists over whom it has custody. I believe that where the control exercised over petitioner is so attenuated as to require the contacts between himself and his commanding officer to be weighed for a jurisdictional nexus, the problem is not where the custodian may be found, but whether the petitioner is in custody at all. The most realistic approach is to recognize that custody as a prerequisite for habeas corpus simply does not exist for an unattached reservist who is under virtually no restraints upon where he may live, work, or study, and whose only connection with the Army is a future obligation to enter active duty. This Court has recognized that a person on active duty with the armed forces is sufficiently "in custody" to invoke habeas corpus. *Eagles* v. *Samuels*, 329 U. S. 304 (1946); *Schlanger* v. *Seamans*, *supra*; *Parisi* v. *Davidson*, 405 U. S. 34 (1972). Aside from ruling that release from active to inactive duty does not moot a habeas proceeding,[2] however, the Court has never considered whether a future obligation to commence Army duty is a sufficiently severe restraint to support habeas jurisdiction.

Habeas corpus is a powerful remedy to be wielded promptly in cases where restrictions on individual liberty

[2] *Gillette* v. *United States*, 401 U. S. 437, 440 n. 2 (1971).

are substantial. The requirement of custody is a primary parameter for preserving the great writ for appropriate situations. It is undefined by statute, but depends upon the severity of restraint upon liberty that is involved. *Jones* v. *Cunningham,* 371 U. S. 236 (1963); Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1073 (1970).

Notions of custody have changed over the years. In 1885, this Court held that a military order restricting a serviceman to the confines of the District of Columbia did not place him in custody. *Wales* v. *Whitney,* 114 U. S. 564 (1885). Recent decisions dealing with nonmilitary petitioners have admittedly broadened the concept of custody. *Jones* v. *Cunningham, supra; Carafas* v. *LaVallee,* 391 U. S. 234 (1968). *Jones* held that a parolee was in custody because he was restricted to the community of his parole, needed special permission to undertake some activities such as driving an auto, and was subject to prompt reincarceration with only administrative proceedings if he violated parole conditions. In *Carafas* a convicted felon who was neither in prison nor on parole was held to be "in custody" because the disabilities of his conviction prevented him from engaging in many types of businesses, voting at any state election, or serving as a labor official or juror.

But even if this nonmilitary standard were to be applied to petitioner, it is difficult to place him in that class of persons laboring under substantial restraints for whom habeas corpus is reserved. By his own admission, petitioner "has not been subject to military orders, reserve meetings or summer active duty." From all that appears in the record, petitioner is free to go anywhere he desires or to engage in any activity he chooses, and is not subject to any Army control until he commences active duty. His situation is indistinguishable from a prospective inductee, who is not considered to

be in custody for habeas corpus purposes until after induction. *DeRozario* v. *Commanding Officer*, 390 F. 2d 532 (CA9 1967). Neither precedent nor the *raison d'être* of the writ sanctions the result reached in this case. Petitioner would be in "custody" only when he reported to Fort Gordon, Georgia, pursuant to his orders, and only then would he be entitled to bring habeas corpus.

III

There is yet another shortcoming in petitioner's claim to habeas corpus.

Unlike those who are covered by the Military Selective Service Act, 50 U. S. C. App. § 451 *et seq.*, there is no statutory right afforded petitioner and other voluntary members of the armed services to be discharged as conscientious objectors. Under Department of Defense Directive 1300.6 the armed forces will approve administrative discharges on a discretionary basis. By assuming that habeas corpus review of the exercise of this discretion is proper, the Court and the courts of appeals applying the same standards of review called for under § 6 (j) of the Military Selective Service Act, 81 Stat. 104, as amended, 85 Stat. 351,[3] have failed to recognize well-established limitations upon habeas corpus in military cases, and the also well-established re-

[3] Most of the circuits have permitted habeas corpus review of an application for discharge under DOD 1300.6. *E. g., United States ex rel. Sheldon* v. *O'Malley*, 137 U. S. App. D. C. 141, 420 F. 2d 1344 (1969); *Bates* v. *Commander*, 413 F. 2d 475 (CA1 1969); *Hammond* v. *Lenfest*, 398 F. 2d 705 (CA2 1968); *Brown* v. *McNamara*, 387 F. 2d 150 (CA3 1967); *United States ex rel. Brooks* v. *Clifford*, 409 F. 2d 700 (CA4 1969); *Brown* v. *Resor*, 407 F. 2d 281 (CA5 1969); *Packard* v. *Rollins*, 422 F. 2d 525 (CA8 1970); *Sertic* v. *Laird*, 418 F. 2d 915 (CA9 1969).

This Court has considered petitions for habeas corpus under DOD 1300.6 in *Craycroft* v. *Ferrall*, 397 U. S. 335 (1970), and *Gillette* v. *United States*, 401 U. S. 437 (1971).

striction upon reviewing the administration of the armed services.

A district court has power to grant a writ of habeas corpus only where a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States" [4] or "is in custody under or by color of the authority of the United States." [5] Petitioner has voluntarily assumed a reserve officer's commission and there is no indication from the record that his present obligation violates either the Constitution or laws of the United States. Nor is he restrained under any color of authority of the United States that cannot be traced to legitimate statutory authorization. Our inquiry should go no further.

In *Burns* v. *Wilson*, 346 U. S. 137 (1953), the Court reiterated the rule that the scope of habeas corpus has always been narrower in military cases than when a prisoner is in civil custody. That case permitted review of a court-martial conviction for claimed violations of constitutional due process where the military justice system had failed to fully consider such claims. Except for constitutional violations, however, relief is proper only if the military had no jurisdiction to take the action complained of.

Lack of jurisdiction to review requests for administrative discharge has similarly been well established. In *Orloff* v. *Willoughby*, 345 U. S. 83 (1953), the Court refused to review a military-duty assignment or to order a discharge on the ground that the petitioner there had been unlawfully treated, recognizing that military discretion is not subject to review in the courts. See also *Noyd* v. *McNamara*, 378 F. 2d 538 (CA10 1967) (refusal to order assignment to nonobjectionable duties or accept resignation of conscientious objector); *United States ex*

[4] 28 U. S. C. § 2241 (c)(3).
[5] 28 U. S. C. § 2241 (c)(1).

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rel. Schonbrun v. *Commanding Officer*, 403 F. 2d 371 (CA2 1968) (no habeas corpus or mandamus jurisdiction to review denial of hardship discharge request); *Antonuk* v. *United States*, 445 F. 2d 592 (CA6 1971) (no jurisdiction to review promotions).

It is said that jurisdiction is established to review military exercise of administrative discretion where the promulgated procedures are not followed. Authority for this proposition is stated to be *Service* v. *Dulles*, 354 U. S. 363 (1957), and *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959). Although the principles of those cases might not carry over undiminished to the military services,[6] some lower courts have assumed that they do.[7] Reviewing an administrative decision for conformity to regulations, however, would afford no relief to petitioner in this case. If his application for discharge was processed as required by DOD Directive 1300.6 the Army has fulfilled its responsibility regardless of whether its ultimate conclusion corresponds to the decision that a court of law would make. In this case the provisions of DOD Directive 1300.6 were applied to petitioner by Army Regulation 135–25. It requires submission of a form request by petitioner, subsequent interviews with a chaplain, medical officer, and an "O–3" hearing officer, consideration of the application by a board of recommendation, and finally action by petitioner's commanding officer. All these procedures were followed in petitioner's case. The Army acted within its jurisdiction in denying the request.

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[6] "[W]e cannot review the merits of appellant's present claim that the Air Force in the case at bar did not comply with its own regulations in regard to appellant. Such a claim must indeed be strained to contain an overtone of constitutional invalidity giving rise to immediate judicial review of its application." *Noyd* v. *McNamara*, 378 F. 2d 538, 540 (CA10 1967).

[7] *E. g.*, *Antonuk* v. *United States*, 445 F. 2d 592 (CA6 1971); *Smith* v. *Resor*, 406 F. 2d 141 (CA2 1969).

Habeas corpus will issue where a person is held in custody under color of federal authority, or in violation of the Constitution or laws of the United States. 28 U. S. C. §§ 2241 (c)(1) and (c)(3). There is no question that the Army had jurisdiction over petitioner at least to the limited extent discussed above in reference to the issue of custody. There is also no question that the Army is under no statutory command to discharge petitioner before the expiration of his contracted period of military service. Acting in accordance with its own procedures, it has chosen not to do so. For me, this ends the permissible scope of habeas corpus inquiry.

THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE POWELL join Part I of this dissent and on that ground would affirm the judgment of the Court of Appeals.

JOHNSON *v.* LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 69–5035. Argued March 1, 1971—Reargued January 10, 1972—Decided May 22, 1972

A warrantless arrest for robbery was made of appellant at his home on the basis of identification from photographs, and he was committed by a magistrate. Thereafter he appeared in a lineup, at which he was represented by counsel, and was identified by the victim of another robbery. He was tried for the latter offense before a 12-man jury and convicted by a nine-to-three verdict, as authorized by Louisiana law in cases where the crime is necessarily punishable at hard labor. Other state law provisions require unanimity for five-man jury trials of offenses in which the punishment may be at hard labor and for 12-man jury trials of capital cases. The Louisiana Supreme Court affirmed the conviction, rejecting appellant's challenge to the jury-trial provisions as violative of due process and equal protection and his claim that the lineup identification was a forbidden fruit of an invasion of appellant's Fourth Amendment rights. Appellant conceded that under *Duncan* v. *Louisiana*, 391 U. S. 145, which was decided after his trial began and which has no retroactive effect, the Sixth Amendment does not apply to his case. *Held:*

1. The provisions of Louisiana law requiring less-than-unanimous jury verdicts in criminal cases do not violate the Due Process Clause for failure to satisfy the reasonable-doubt standard. Pp. 359–363.

(a) The mere fact that three jurors vote to acquit does not mean that the nine who vote to convict have ignored their instructions concerning proof beyond a reasonable doubt or that they do not honestly believe that guilt has been thus proved. Pp. 360–362.

(b) Want of jury unanimity does not alone establish reasonable doubt. Pp. 362–363.

2. The Louisiana legal scheme providing for unanimous verdicts in capital and five-man jury cases but for less-than-unanimous verdicts otherwise, and which varies the difficulty of proving guilt with the gravity of the offense, was designed to serve the rational purposes of "facilitat[ing], expedit[ing], and reduc[ing] expense in the administration of justice," and does not constitute an invidious classification violative of equal protection. Pp. 363–365.

3. Since no evidence constituting the fruit of an illegal arrest was used at appellant's trial, the validity of his arrest is not at issue and the lineup was conducted, not by the "exploitation" of the arrest, but under the authority of appellant's commitment by the magistrate, which purged the lineup procedure of any "primary taint." P. 365.

255 La. 314, 230 So. 2d 825, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., *post*, p. 365, and POWELL, J., *post*, p. 366, filed concurring opinions. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 380. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 395. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 397. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 399.

Richard A. Buckley reargued the cause and filed a brief for appellant.

Louise Korns reargued the cause for appellee. With her on the brief were *Jack P. F. Gremillion*, Attorney General of Louisiana, and *Jim Garrison*.

MR. JUSTICE WHITE delivered the opinion of the Court.

Under both the Louisiana Constitution and Code of Criminal Procedure, criminal cases in which the punishment is necessarily at hard labor are tried to a jury of 12, and the vote of nine jurors is sufficient to return either a guilty or not guilty verdict.[1] The principal question

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[1] La. Const., Art. VII, § 41, provides:

"Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at

in this case is whether these provisions allowing less-than-unanimous verdicts in certain cases are valid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

I

Appellant Johnson was arrested at his home on January 20, 1968. There was no arrest warrant, but the victim of an armed robbery had identified Johnson from photographs as having committed the crime. He was then identified at a lineup, at which he had counsel, by the victim of still another robbery. The latter crime is involved in this case. Johnson pleaded not guilty, was tried on May 14, 1968, by a 12-man jury and was convicted by a nine-to-three verdict. His due process and equal protection challenges to the Louisiana constitutional and statutory provisions were rejected by the Louisiana courts, 255 La. 314, 230 So. 2d 825 (1970), and he appealed here. We noted probable jurisdiction. 400 U. S. 900 (1970). Conceding that under *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), the Sixth Amendment is not applicable to his case, see *DeStefano* v. *Woods*, 392 U. S. 631 (1968), appellant presses his equal protection

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hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Code Crim. Proc., Art. 782, provides:

"Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived."

and due process claims, together with a Fourth Amendment claim also rejected by the Louisiana Supreme Court. We affirm.

II

Appellant argues that in order to give substance to the reasonable-doubt standard, which the State, by virtue of the Due Process Clause of the Fourteenth Amendment, must satisfy in criminal cases, see *In re Winship*, 397 U. S. 358, 363–364 (1970), that clause must be construed to require a unanimous-jury verdict in all criminal cases. In so contending, appellant does not challenge the instructions in this case. Concededly, the jurors were told to convict only if convinced of guilt beyond a reasonable doubt. Nor is there any claim that, if the verdict in this case had been unanimous, the evidence would have been insufficient to support it. Appellant focuses instead on the fact that less than all jurors voted to convict and argues that, because three voted to acquit, the reasonable-doubt standard has not been satisfied and his conviction is therefore infirm.

We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that "[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict." *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912) (dictum). Accord, *Maxwell* v. *Dow*, 176 U. S. 581, 602, 605 (1900) (dictum). These statements, moreover, co-existed with cases indicating that proof of guilt beyond a reasonable doubt is implicit in constitutions recognizing "the fundamental principles that are deemed essential for the protection of life and liberty." *Davis* v. *United States*, 160 U. S. 469, 488 (1895). See also *Leland* v. *Oregon*, 343 U. S. 790, 802–803 (1952) (dissenting opinion); *Brinegar*

v. *United States*, 338 U. S. 160, 174 (1949); *Coffin* v. *United States*, 156 U. S. 432, 453–460 (1895).[2]

Entirely apart from these cases, however, it is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt. Appellant's contrary argument breaks down into two parts, each of which we shall consider separately: first, that nine individual jurors will be unable to vote conscientiously in favor of guilt beyond a reasonable doubt when three of their colleagues are arguing for acquittal, and second, that guilt cannot be said to have been proved beyond a reasonable doubt when one or more of a jury's members at the conclusion of deliberation still possess such a doubt. Neither argument is persuasive.

Numerous cases have defined a reasonable doubt as one " 'based on reason which arises from the evidence or lack of evidence.' " *United States* v. *Johnson*, 343 F. 2d 5, 6 n. 1 (CA2 1965). Accord, *e. g.*, *Bishop* v. *United States*, 71 App. D. C. 132, 138, 107 F. 2d 297, 303 (1939); *United States* v. *Schneiderman*, 106 F. Supp. 906, 927 (SD Cal. 1952); *United States* v. *Haupt*, 47 F. Supp. 836, 840 (ND Ill. 1942), rev'd on other grounds, 136 F. 2d 661 (CA7 1943). In *Winship*, *supra*, the Court recognized this evidentiary standard as " 'impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' " 397 U. S., at 364 (citation omitted). In considering the first branch

[2] *Coffin* contains a lengthy discussion on the requirement of proof beyond a reasonable doubt and other similar standards of proof in ancient Hebrew, Greek, and Roman law, as well as in the common law of England. This discussion suggests that the Court of the late 19th century would have held the States bound by the reasonable-doubt standard under the Due Process Clause of the Fourteenth Amendment on the assumption that the standard was essential to a civilized system of criminal procedure. See generally *Duncan* v. *Louisiana*, 391 U. S. 145, 149–150, n. 14 (1968).

of appellant's argument, we can find no basis for holding that the nine jurors who voted for his conviction failed to follow their instructions concerning the need for proof beyond such a doubt or that the vote of any one of the nine failed to reflect an honest belief that guilt had been so proved. Appellant, in effect, asks us to assume that, when minority jurors express sincere doubts about guilt, their fellow jurors will nevertheless ignore them and vote to convict even if deliberation has not been exhausted and minority jurors have grounds for acquittal which, if pursued, might persuade members of the majority to acquit. But the mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt. We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. Indeed, at this point, a "dissenting juror should consider whether his doubt was a reasonable one . . . [when it made] no impression upon the minds of so many

men, equally honest, equally intelligent with himself." *Allen* v. *United States*, 164 U. S. 492, 501 (1896). Appellant offers no evidence that majority jurors simply ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction, and before we alter our own longstanding perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions.

We conclude, therefore, that, as to the nine jurors who voted to convict, the State satisfied its burden of proving guilt beyond any reasonable doubt. The remaining question under the Due Process Clause is whether the vote of three jurors for acquittal can be said to impeach the verdict of the other nine and to demonstrate that guilt was not in fact proved beyond such doubt. We hold that it cannot.

Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors—a substantial majority of the jury—were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard. Jury verdicts finding guilt beyond a reasonable doubt are regularly sustained even though the evidence was such that the jury would have been justified in having a reasonable doubt, see *United States* v. *Quarles*, 387 F. 2d 551, 554 (CA4 1967); *Bell* v. *United States*, 185 F. 2d 302, 310 (CA4 1950); even though the trial judge might not have

reached the same conclusion as the jury, see *Takahashi* v. *United States,* 143 F. 2d 118, 122 (CA9 1944); and even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction. See *United States* v. *Johnson,* 140 U. S. App. D. C. 54, 60, 433 F. 2d 1160, 1166 (1970); *United States* v. *Manuel-Baca,* 421 F. 2d 781, 783 (CA9 1970). That want of jury unanimity is not to be equated with the existence of a reasonable doubt emerges even more clearly from the fact that when a jury in a federal court, which operates under the unanimity rule and is instructed to acquit a defendant if it has a reasonable doubt about his guilt, see *Holt* v. *United States,* 218 U. S. 245, 253 (1910); *Agnew* v. *United States,* 165 U. S. 36, 51 (1897); W. Mathes & E. Devitt, Federal Jury Practice and Instructions § 8.01 (1965), cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial. *Downum* v. *United States,* 372 U. S. 734, 736 (1963); *Dreyer* v. *Illinois,* 187 U. S. 71, 85–86 (1902); *United States* v. *Perez,* 9 Wheat. 579, 580 (1824). If the doubt of a minority of jurors indicates the existence of a reasonable doubt, it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial. We conclude, therefore, that verdicts rendered by nine out of 12 jurors are not automatically invalidated by the disagreement of the dissenting three. Appellant was not deprived of due process of law.

III

Appellant also attacks as violative of the Equal Protection Clause the provisions of Louisiana law requiring unanimous verdicts in capital and five-man jury cases, but permitting less-than-unanimous verdicts in cases such as his. We conclude, however, that the Louisiana statutory scheme serves a rational purpose and is not subject to constitutional challenge.

In order to "facilitate, expedite, and reduce expense in the administration of criminal justice," *State* v. *Lewis*, 129 La. 800, 804, 56 So. 893, 894 (1911), Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams* v. *Florida*, 399 U. S. 78 (1970). Three jurors here voted to acquit, but from what we have earlier said, this does not demonstrate that appellant was convicted on a lower standard of proof. To obtain a conviction in any of the categories under Louisiana law, the State must prove guilt beyond reasonable doubt, but the number of jurors who must be so convinced increases with the seriousness of the crime and the severity of the punishment that may be imposed. We perceive nothing unconstitutional or invidiously discriminatory, however, in a State's insisting that its burden of proof be carried with more jurors where more serious crimes or more severe punishments are at issue.

Appellant nevertheless insists that dispensing with unanimity in his case disadvantaged him as compared with those who commit less serious or capital crimes. With respect to the latter, he is correct; the State does make conviction more difficult by requiring the assent of all 12 jurors. Appellant might well have been ultimately acquitted had he committed a capital offense. But as we have indicated, this does not constitute a denial of equal protection of the law; the State may treat capital offenders differently without violating the constitutional rights of those charged with lesser crimes. As to the crimes triable by a five-man jury, if appel-

lant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense.

IV

Appellant also urges that his nighttime arrest without a warrant was unlawful in the absence of a valid excuse for failing to obtain a warrant and, further, that his subsequent lineup identification was a forbidden fruit of the claimed invasion of his Fourth Amendment rights. The validity of Johnson's arrest, however, is beside the point here, for it is clear that no evidence that might properly be characterized as the fruit of an illegal entry and arrest was used against him at his trial. Prior to the lineup, at which Johnson was represented by counsel, he was brought before a committing magistrate to advise him of his rights and set bail. At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by "exploitation" of the challenged arrest but "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 371 U. S. 471, 488 (1963).

The judgment of the Supreme Court of Louisiana is therefore

Affirmed.

MR. JUSTICE BLACKMUN, concurring.*

I join the Court's opinion and judgment in each of these cases. I add only the comment, which should be

*[This opinion applies also to No. 69-5046, *Apodaca et al.* v. *Oregon*, *post*, p. 404.]

obvious and should not need saying, that in so doing I do not imply that I regard a State's split-verdict system as a wise one. My vote means only that I cannot conclude that the system is constitutionally offensive. Were I a legislator, I would disfavor it as a matter of policy. Our task here, however, is not to pursue and strike down what happens to impress us as undesirable legislative policy.

I do not hesitate to say, either, that a system employing a 7–5 standard, rather than a 9–3 or 75% minimum, would afford me great difficulty. As MR. JUSTICE WHITE points out, *ante*, at 362, "a substantial majority of the jury" are to be convinced. That is all that is before us in each of these cases.

MR. JUSTICE POWELL, concurring in No. 69–5035 and concurring in the judgment in No. 69–5046.

I concur in the judgment of the Court that convictions based on less-than-unanimous jury verdicts in these cases did not deprive criminal defendants of due process of law under the Fourteenth Amendment. As my reasons for reaching this conclusion in the Oregon case differ from those expressed in the plurality opinion of MR. JUSTICE WHITE, I will state my views separately.

I

69–5035

Duncan v. *Louisiana*, 391 U. S. 145 (1968), stands for the proposition that criminal defendants in state courts are entitled to trial by jury.[1] The source of that right is the Due Process Clause of the Fourteenth Amendment. Due process, as consistently interpreted by this Court, commands that citizens subjected to criminal

[1] That right, of course, is reserved for those crimes that may be deemed "serious." See *id.*, at 159–162; *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *Baldwin* v. *New York*, 399 U. S. 66 (1970).

process in state courts be accorded those rights that are fundamental to a fair trial in the context of our "American scheme of justice." *Id.*, at 149. The right of an accused person to trial by a jury of his peers was a cherished element of the English common law long before the American Revolution. In this country, prior to *Duncan*, every State had adopted a criminal adjudicatory process calling for the extensive use of petit juries. *Id.*, at 150 n. 14; *Turner* v. *Louisiana*, 379 U. S. 466, 471 n. 9 (1965). Because it assures the interposition of an impartial assessment of one's peers between the defendant and his accusers, the right to trial by jury deservedly ranks as a fundamental of our system of jurisprudence. With this principle of due process, I am in full accord.

In *DeStefano* v. *Woods*, 392 U. S. 631 (1968), an Oregon petitioner sought to raise the question, left open in *Duncan*, whether the right to jury trial in a state court also contemplates the right to a unanimous verdict.[2] Because the Court concluded that *Duncan* was not to have retroactive applicability, it found it unnecessary to decide whether the Fourteenth Amendment requires unanimity. The trial in the case before the Court at that time occurred several years prior to May 20, 1968, the date of decision in *Duncan*. In the Louisiana case now before us, the petitioner also was convicted by a less-than-unanimous verdict before *Duncan* was decided. Accordingly, I read *DeStefano* as foreclosing consideration in this case of the question whether jury trial as guaranteed by the Due Process Clause contemplates a corollary requirement that its judgment be unanimous.

Indeed, in *Johnson* v. *Louisiana*, appellant concedes that the nonretroactivity of *Duncan* prevents him from raising his due process argument in the classic "fundamental fairness" language adopted there. Instead he

[2] This contention was raised in *Carcerano* v. *Gladden*, which was consolidated and disposed of along with the *DeStefano* opinion.

claims that he is deprived of due process because a conviction in which only nine of 12 jurors joined is not one premised on a finding of guilt beyond a reasonable doubt, held to be a requisite element of due process in *In re Winship*, 397 U. S. 358, 364 (1970). For the reasons stated in the majority opinion, I do not agree that Louisiana's less-than-unanimous verdict rule undercuts the applicable standard of proof in criminal prosecutions in that State.

Appellant also asks this Court to find a violation of the Equal Protection Clause in Louisiana's constitutional and statutory provisions establishing the contours of the jury trial right in that State. The challenged provisions divide those accused of crimes into three categories depending on the severity of the possible punishment: those charged with offenses for which the punishment might be at hard labor are entitled to a five-juror, unanimous verdict; those charged with offenses for which the punishment will necessarily be at hard labor are entitled to a verdict in which nine of 12 jurors must concur; and those charged with capital offenses are entitled to a 12-juror, unanimous verdict. La. Const., Art. VII, § 41; La. Code Crim. Proc., Art. 782. Such distinctions between classes of defendants do not constitute invidious discrimination against any one of the classes unless the State's classification can be said to lack a reasonable or rational basis. We have been shown no reason to question the rationality of Louisiana's tri-level system. I, therefore, join the Court's opinion in *Johnson* v. *Louisiana* affirming the decision below.[3]

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[3] In addition to the jury trial issues in this case, I also join Part IV of the Court's opinion insofar as it concludes that the lineup identification was not the fruit of the prior warrantless arrest. *Wong Sun* v. *United States*, 371 U. S. 471 (1963). Under the circumstances of this case, I find it unnecessary to reach the question whether appellant's warrantless arrest was constitutionally invalid.

II

69–5046

In the Oregon case decided today, *Apodaca* v. *Oregon*, the trials occurred after *Duncan* was decided. The question left unanswered in *Duncan* and *DeStefano* is therefore squarely presented. I concur in the plurality opinion in this case insofar as it concludes that a defendant in a state court may constitutionally be convicted by less than a unanimous verdict, but I am not in accord with a major premise upon which that judgment is based. Its premise is that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment.[4] I do not think that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment. As Mr. Justice Fortas, concurring in *Duncan* v. *Louisiana*, 391 U. S., at 213, said:

> "Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied."

In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial. *Andres* v. *United States*, 333 U. S. 740, 748–749 (1948); *Patton* v. *United States*, 281 U. S. 276, 288–290 (1930); *Hawaii*

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[4] Jury trial in federal cases is also assured by Art. III, § 2, of the Constitution: "The Trial of all Crimes . . . shall be by Jury."

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v. *Mankichi*, 190 U. S. 197, 211–212 (1903) (see also Mr. Justice Harlan's dissenting opinion); *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900) (see also Mr. Justice Harlan's dissenting opinion); *Thompson* v. *Utah*, 170 U. S. 343, 355 (1898).[5] In these cases, the Court has presumed that unanimous verdicts are essential in federal jury trials, not because unanimity is necessarily fundamental to the function performed by the jury, but because that result is mandated by history.[6] The reasoning that

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[5] See also MR. JUSTICE WHITE's opinion for the Court in *Swain* v. *Alabama*, 380 U. S. 202, 211 (1965), stating, in dictum, that "Alabama adheres to the common-law system of trial by an impartial jury of 12 men who must unanimously agree on a verdict, *the system followed in the federal courts by virtue of the Sixth Amendment*." (Emphasis supplied.)

The same result has been attained with respect to the right to jury trial in civil cases under the Seventh Amendment. See *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 467–468 (1897); *Springville* v. *Thomas*, 166 U. S. 707 (1897).

[6] The process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law. See *Williams* v. *Florida*, 399 U. S. 78, 117, 122–129 (1970) (separate opinion of Harlan, J.).

A recent example of that process of constitutional adjudication may be found in Part II of the Court's opinion in *Duncan* v. *Louisiana*, 391 U. S., at 159–162, in which "petty" offenses were excluded from the rule requiring jury trial because such "offenses were tried without juries both in England and in the Colonies." The Court found "no substantial evidence that the Framers intended to depart from this established common-law practice." *Id.*, at 160. To the same effect, see Mr. Justice Harlan's dissent in *Baldwin* v. *New York* (appearing in *Williams* v. *Florida*, 399 U. S., at 119–121).

Also representative of this historical approach to the Sixth Amendment are the exhaustive majority and dissenting opinions in *Sparf* v. *United States*, 156 U. S. 51 (1895), in which the Court ultimately concluded that federal criminal juries were empowered only to decide questions of "fact." Rather than attempting to determine whether the fact-law distinction was desirable or whether it might be essential to the function performed by juries, the decision was premised on

runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law.[7] At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law.[8] It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial.

But it is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials to those accused of serious crimes. This Court has said, in cases decided when the intendment of that Amendment was not as clouded by the passage of time, that due process does not require that the States apply the federal jury-trial right with all its gloss. In *Maxwell* v. *Dow*, 176 U. S., at 605, Mr. Justice Peckham, speaking for eight of the nine members of the Court, so stated:

> "[W]hen providing in their constitution and legislation for the manner in which civil or criminal ac-

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the conclusion that English and Colonial juries had no right to decide questions of law.

The same historical approach accounts for the numerous Supreme Court opinions (see text accompanying n. 5), finding unanimity to be one of the attributes subsumed under the term "jury trial." No reason, other than the conference committee's revision of the House draft of the Sixth Amendment, has been offered to justify departure from this Court's prior precedents. The admitted ambiguity of that piece of legislative history is not sufficient, in my view, to override the unambiguous history of the common-law right. *Williams* v. *Florida*, 399 U. S., at 123 n. 9.

[7] See, *e. g.*, R. Perry, Sources of Our Liberties 270, 281–282, 288, 429 (1959); 3 J. Story, Commentaries on the Constitution 652–653 (1st ed. 1833).

[8] See, *e. g.*, 4 W. Blackstone, Commentaries *376; W. Forsyth, History of Trial By Jury 238–258 (1852); M. Hale, Analysis of the Law of England 119 (1716).

> tions shall be tried, it is in entire conformity with the character of the Federal Government that [the States] should have the right to decide for themselves what shall be the form and character of the procedure in such trials, . . . whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. . . ."

Again, in *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912), the Court concluded that "[i]n criminal cases due process of law is not denied by a state law which dispenses with . . . the necessity of a jury of twelve, or unanimity in the verdict."

It is true, of course, that the *Maxwell* and *Jordan* Courts went further and concluded that the States might dispense with jury trial altogether. That conclusion, grounded on a more limited view of due process than has been accepted by this Court in recent years,[9] was rejected by the Court in *Duncan*. But I find nothing in the constitutional principle upon which *Duncan* is based, or in other precedents, that requires repudiation of the views expressed in *Maxwell* and *Jordan* with respect to the size of a jury and the unanimity of its verdict. Mr. Justice Fortas, concurring in *Duncan*, commented on the distinction between the requirements of the Sixth Amend-

[9] I agree with MR. JUSTICE WHITE'S analysis in *Duncan* that the departure from earlier decisions was, in large measure, a product of a change in focus in the Court's approach to due process. No longer are questions regarding the constitutionality of particular criminal procedures resolved by focusing alone on the element in question and ascertaining whether a system of criminal justice might be imagined in which a fair trial could be afforded in the absence of that particular element. Rather, the focus is, as it should be, on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States. *Duncan* v. *Louisiana*, *supra*, at 149–150, n. 14. That approach to due process readily accounts both for the conclusion that jury trial *is* fundamental and that unanimity *is not*. See Part III, *infra*.

ment and those of the Due Process Clause and suggested the appropriate framework for analysis of the issue in this case.

> "I see no reason whatever . . . to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States." *Duncan* v. *Louisiana*, 391 U. S., at 213.

The question, therefore, that should be addressed in this case is whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment. An affirmative answer, ignoring the strong views previously expressed to the contrary by this Court in *Maxwell* and *Jordan*, would give unwarranted and unwise scope to the incorporation doctrine as it applies to the due process right of state criminal defendants to trial by jury.

The importance that our system attaches to trial by jury derives from the special confidence we repose in a "body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Williams* v. *Florida*, 399 U. S. 78, 87 (1970). It is this safeguarding function, preferring the commonsense judgment of a jury as a bulwark "against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," [10] that lies at the core of our dedication to the principles of jury determination of guilt or inno-

[10] *Duncan* v. *Louisiana*, 391 U. S., at 156. See also *Baldwin* v. *New York*, 399 U. S., at 72.

cence.[11] This is the fundamental of jury trial that brings it within the mandate of due process. It seems to me that this fundamental is adequately preserved by the jury-verdict provision of the Oregon Constitution. There is no reason to believe, on the basis of experience in Oregon or elsewhere, that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined in by 10 members of a jury of 12. The standard of due process assured by the Oregon Constitution provides a sufficient guarantee that the government will not be permitted to impose its judgment on an accused without first meeting the full burden of its prosecutorial duty.[12]

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[11] Indeed, so strongly felt was the jury's role as the protector of "innocence against the consequences of the partiality and undue bias of judges in favor of the prosecution," that, at an earlier point in this country's history, some of the States deemed juries the final arbiters of all questions arising in criminal prosecutions, whether factual or legal. To allow judges to determine the law was considered by some States to pose too great a risk of judicial oppression, favoring the State above the accused. See, *e. g.*, *State* v. *Croteau*, 23 Vt. 14, 21 (1849); Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939). That historical preference for jury decisionmaking is still reflected in the criminal procedures of two States. Ind. Const., Art. I, § 19; Md. Const., Art. XV, § 5. See *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Wyley* v. *Warden*, 372 F. 2d 742, 746 (CA4), cert. denied, 389 U. S. 863 (1967); *Beavers* v. *State*, 236 Ind. 549, 141 N. E. 2d 118 (1957).

[12] The available empirical research indicates that the jury-trial protection is not substantially affected by less-than-unanimous verdict requirements. H. Kalven and H. Zeisel, in their frequently cited study of American juries (The American Jury (Phoenix ed. 1971)), note that where unanimity is demanded 5.6% of the cases result in hung juries. *Id.*, at 461. Where unanimity is not required, available statistics indicate that juries will still be hung in over 3% of the cases. Thus, it may be estimated roughly that Oregon's practice may result in verdicts in some 2.5% more of the cases—cases in which no verdict would be returned if unanimity were demanded. Given the large number of causes to which this percentage disparity

Moreover, in holding that the Fourteenth Amendment has incorporated "jot-for-jot and case-for-case" [13] every element of the Sixth Amendment, the Court derogates principles of federalism that are basic to our system. In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment with adjudicatory processes different from the federal model. At the same time, the Court's understandable unwillingness to impose requirements that it finds unnecessarily rigid (*e. g.*, *Williams* v. *Florida*, 399 U. S. 78), has culminated in the dilution of federal rights that were, until these decisions, never seriously questioned. The doubly undesirable consequence of this reasoning process, labeled by Mr. Justice Harlan as "constitutional schizophrenia," *id.*, at 136, may well be detrimental both to the state and federal criminal justice systems. Although it is perhaps late in the day for an expression of my views, I would have been in accord with the opinions in similar cases by THE CHIEF JUSTICE and Justices Harlan, STEWART, and Fortas [14] that, at least in defining the elements of the right to jury trial, there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards.[15]

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might be attributed, and given the possibility of conviction on retrial, it is impossible to conclude that this percentage represents convictions obtained under standards offensive to due process.

[13] *Duncan* v. *Louisiana, supra,* at 181 (Harlan, J., dissenting).

[14] *Id.*, at 173–183 (Harlan, J., dissenting); *Bloom* v. *Illinois,* 391 U. S., at 211 (Fortas, J., concurring); *Baldwin* v. *New York,* 399 U. S., at 76–77 (BURGER, C. J., dissenting); *Williams* v. *Florida,* 399 U. S., at 117, 143 (separate opinions of Harlan, J., and STEWART, J.). Cf. MR. JUSTICE DOUGLAS' concurring opinion in *Alexander* v. *Louisiana,* 405 U. S. 625, 637 n. 4 (1972).

[15] My unwillingness to accept the "incorporationist" notion that jury trial must be applied with total uniformity does not require

While the Civil War Amendments altered substantially the balance of federalism, it strains credulity to believe that they were intended to deprive the States of all freedom to experiment with variations in jury-trial procedure. In an age in which empirical study is increasingly relied upon as a foundation for decisionmaking, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal justice system. The same diversity of local legislative responsiveness that marked the development of economic and social reforms in this country,[16] if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused.

Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial, I see no constitutional infirmity in the provision adopted by the people of Oregon. It is the product of a constitutional amendment, approved by a vote of the people in the State, and appears to be patterned on a provision of the American Law Institute's Code of Crim-

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that I take issue with every precedent of this Court applying various criminal procedural rights to the States with the same force that they are applied in federal courts. See Mr. Justice Fortas' opinion in *Bloom* v. *Illinois*, 391 U. S., at 214, which also applied to *Duncan*.

[16] See Mr. Justice Brandeis' oft-quoted dissent in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 309–311 (1932), in which he details the stultifying potential of the substantive due process doctrine.

inal Procedure.[17] A similar decision has been echoed more recently in England where the unanimity requirement was abandoned by statutory enactment.[18] Less-than-unanimous verdict provisions also have been viewed with approval by the American Bar Association's Criminal Justice Project.[19] Those who have studied the jury mechanism and recommended deviation from the historic rule of unanimity have found a number of considerations to be significant. Removal of the unanimity requirement could well minimize the potential for hung juries occasioned either by bribery or juror irrationality. Furthermore, the rule that juries must speak with a single voice often leads, not to full agreement among the 12 but to agreement by none and compromise by all, despite the frequent absence of a rational basis for such compromise.[20] Quite apart from whether Justices sitting on this Court would have deemed advisable the adoption of any particular less-than-unanimous jury provision, I think that considerations of this kind reflect a legitimate basis for experimentation and deviation from the federal blueprint.[21]

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[17] ALI, Code of Criminal Procedure § 335 (1930).

[18] Criminal Justice Act 1967, c. 80, § 13 (Great Britain).

[19] American Bar Association, Project on Standards for Criminal Justice, Trial By Jury § 1.1 (Approved Draft 1968) (see also commentary, at 25–28).

[20] See, *e. g.*, Kalven & Zeisel, The American Jury: Notes For an English Controversy, 48 Chi. B. Rec. 195 (1967); Samuels, Criminal Justice Act, 31 Mod. L. Rev. 16, 24–27 (1968); Comment, Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt, 21 U. Chi. L. Rev. 438, 444–445 (1954); Comment, Should Jury Verdicts Be Unanimous in Criminal Cases?, 47 Ore. L. Rev. 417 (1968).

[21] See *State* v. *Gann*, 254 Ore. 549, 463 P. 2d 570 (1969).

Approval of Oregon's 10–2 requirement does not compel acceptance of all other majority-verdict alternatives. Due process and its mandate of basic fairness often require the drawing of difficult lines. See *Francis* v. *Resweber*, 329 U. S. 459, 466, 471 (1947)

III

Petitioners in *Apodaca* v. *Oregon*, in addition to their primary contention that unanimity is a requirement of state jury trials because the Fourteenth Amendment "incorporates" the Sixth, also assert that Oregon's constitutional provision offends the federal constitutional guarantee against the systematic exclusion of any group within the citizenry from participating in the criminal trial process. While the systematic exclusion of identifiable minorities from jury service has long been recognized as a violation of the Equal Protection Clause (see, *e. g.*, *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880)), in more recent years the Court has held that criminal defendants are entitled, as a matter of due process, to a jury drawn from a representative cross section of the community. This is an essential element of a fair and impartial jury trial. See *Williams* v. *Florida*, 399 U. S., at 100; *Alexander* v. *Louisiana*, 405 U. S. 625, 634 (1972) (DOUGLAS, J., concurring). Petitioners contend that less-than-unanimous jury verdict provisions undercut that right by implicitly permitting in the jury room that which is prohibited in the jury venire selection process—the exclusion of minority group viewpoints. They argue that unless unanimity is required even of a properly drawn jury, the result—whether conviction or acquittal—may be the unjust product of racism, bigotry, or an emotionally inflamed trial.

Such fears materialize only when the jury's majority, responding to these extraneous pressures, ignores the evidence and the instructions of the court as well as the

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(Frankfurter, J., concurring). Full recognition of the function performed by jury trials, coupled with due respect for the presumptive validity of state laws based on rational considerations such as those mentioned above, will assist in finding the required balance when the question is presented in a different context.

rational arguments of the minority. The risk, however, that a jury in a particular case will fail to meet its high responsibility is inherent in any system that commits decisions of guilt or innocence to untrained laymen drawn at random from the community. In part, at least, the majority-verdict rule must rely on the same principle that underlies our historic dedication to jury trial: both systems are premised on the conviction that each juror will faithfully perform his assigned duty. MR. JUSTICE DOUGLAS' dissent today appears to rest on the contrary assumption that the members of the jury constituting the majority have no *duty* to consider the minority's viewpoint in the course of deliberation. Characterizing the jury's consideration of minority views as mere "polite and academic conversation," or "courtesy dialogue," he concludes that a jury is under no obligation in Oregon to deliberate at all if 10 jurors vote together at the outset. *Post,* at 389. No such power freely to shut off competing views is implied in the record in this case and it is contrary to basic principles of jury participation in the criminal process. While there may be, of course, reasonable differences of opinion as to the merit of the speculative concerns expressed by these petitioners and reflected in the dissenting opinion, I find nothing in Oregon's experience to justify the apprehension that juries not bound by the unanimity rule will be more likely to ignore their historic responsibility.

Moreover, the States need not rely on the presumption of regularity in a vacuum since each has at its disposal protective devices to diminish significantly the prospect of jury irresponsibility. Even before the jury is sworn, substantial protection against the selection of a representative but wilfully irresponsible jury is assured by the wide availability of peremptory challenges and challenges for cause.[22] The likelihood of miscarriage of justice is

[22] See, *e. g., Swain* v. *Alabama,* 380 U. S. 202, 209–222 (1965).

further diminished by the judge's use of full jury instructions, detailing the applicable burdens of proof, informing the jurors of their duty to weigh the views of fellow jurors,[23] and reminding them of the solemn responsibility imposed by their oaths. Trial judges also retain the power to direct acquittals in cases in which the evidence of guilt is lacking, or to set aside verdicts once rendered when the evidence is insufficient to support a conviction. Furthermore, in cases in which public emotion runs high or pretrial publicity threatens a fair trial, judges possess broad power to grant changes of venue,[24] and to impose restrictions on the extent of press coverage.[25]

In light of such protections it is unlikely that the Oregon "ten-of-twelve" rule will account for an increase in the number of cases in which injustice will be occasioned by a biased or prejudiced jury. It may be wise to recall MR. JUSTICE WHITE'S admonition in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 102 (1964), that the Constitution "protects against real dangers, not remote and speculative possibilities." Since I do not view Oregon's less-than-unanimous jury verdict requirement as violative of the due process guarantee of the Fourteenth Amendment, I concur in the Court's affirmance of these convictions.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.*

Appellant in the Louisiana case and petitioners in the Oregon case were convicted by juries that were less than unanimous. This procedure is authorized by both the

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[23] *Allen* v. *United States*, 164 U. S. 492 (1896).

[24] See, *e. g.*, *Irvin* v. *Dowd*, 366 U. S. 717 (1961).

[25] See, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Estes* v. *Texas*, 381 U. S. 532 (1965).

*[This opinion applies also to No. 69-5046, *Apodaca et al.* v. *Oregon*, *post*, p. 404.]

Louisiana and Oregon Constitutions. Their claim, rejected by the majority, is that this procedure is a violation of their federal constitutional rights. With due respect to the majority, I dissent from this radical departure from American traditions.

I

The Constitution does not mention unanimous juries. Neither does it mention the presumption of innocence, nor does it say that guilt must be proved beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue. *In re Winship*, 397 U. S. 358, 364.

The Court, speaking through MR. JUSTICE BRENNAN, stated that:

> "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.
>
> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Ibid.*

I had similarly assumed that there was no dispute that the Federal Constitution required a unanimous jury in all criminal cases. After all, it has long been explicit constitutional doctrine that the Seventh Amendment civil jury must be unanimous. See *American Publishing Co.* v. *Fisher*, 166 U. S. 464, where the Court said that "unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition." *Id.*, at 468. Like proof beyond a reasonable doubt, the issue of unanimous juries in criminal cases simply never arose. Yet in cases dealing with juries it had always been assumed that a unanimous jury was required.[1] See *Maxwell* v. *Dow*, 176 U. S. 581, 586; *Patton* v. *United States*, 281 U. S. 276, 288; *Andres* v. *United States*, 333 U. S. 740,

[1] See also 2 J. Story, Commentaries on the Constitution 559 n. 2 (5th ed. 1891): "A trial by jury is generally understood to mean *ex vi termini*, a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." In the 1969 Term we held a jury of six was sufficient, *Williams* v. *Florida*, 399 U. S. 78, but we noted that neither evidence nor theory suggested 12 was more favorable to the accused than six. The same cannot be said for unanimity and impartial selection of jurors. See *infra*, at 388–394.

Story's Commentaries cite no statutory authority for the requirement of unanimity in a criminal jury. That is because such authority has never been thought necessary. The unanimous jury has been so embedded in our legal history that no one would question its constitutional position and thus there was never any need to codify it. Indeed, no criminal case dealing with a unanimous jury has ever been decided by this Court before today, largely because of this unquestioned constitutional assumption. A similar assumption had, of course, been made with respect to the Seventh Amendment civil jury, but that issue did reach the Court. And the Court had no difficulty at all in holding a unanimous jury was a constitutional requirement. *American Publishing Co.* v. *Fisher*, 166 U. S. 464.

748. Today the bases of those cases are discarded and two centuries of American history are shunted aside.[2]

The result of today's decisions is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?

We held unanimously in 1948 that the Bill of Rights requires a unanimous jury verdict:

> "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." *Andres* v. *United States,* 333 U. S., at 748.

After today's decisions, a man's property may only be taken away by a unanimous jury vote, yet he can be stripped of his liberty by a lesser standard. How can that result be squared with the law of the land as expressed in the settled and traditional requirements of procedural due process?

Rule 31 (a) of the Federal Rules of Criminal Procedure states, "The verdict shall be unanimous." That Rule was made by this Court with the concurrence of Congress pursuant to 18 U. S. C. § 3771. After today a unanimous verdict will be required in a federal prosecution but not in a state prosecution. Yet the source of the right in each case is the Sixth Amendment. I fail

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[2] Of course, the unanimous jury's origin is long before the American Revolution. The first recorded case where there is a requirement of unanimity is *Anonymous Case,* 41 Lib. Assisarum 11 (1367), reprinted in English in R. Pound & T. Plucknett, Readings on the History and System of the Common Law 155–156 (3d ed. 1927).

to see how with reason we can maintain those inconsistent dual positions.

There have, of course, been advocates of the view that the duties imposed on the States by reason of the Bill of Rights operating through the Fourteenth Amendment are a watered-down version of those guarantees. But we held to the contrary in *Malloy* v. *Hogan*, 378 U. S. 1, 10–11:

> "We have held that the guarantees of the First Amendment, *Gitlow* v. *New York, supra; Cantwell* v. *Connecticut*, 310 U. S. 296; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293, the prohibition of unreasonable searches and seizures of the Fourth Amendment, *Ker* v. *California*, 374 U. S. 23, and the right to counsel guaranteed by the Sixth Amendment, *Gideon* v. *Wainwright, supra*, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"

Malloy, of course, not only applied the Self-Incrimination Clause to the States but also stands for the proposition, as mentioned, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." *Id.*, at 11. See also *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79. The equation of federal and state standards for the Self-Incrimination Clause was expressly reaffirmed in *Grif-*

fin v. *California*, 380 U. S. 609, 615; and in *Miranda* v. *Arizona*, 384 U. S. 436, 464.

Similarly, when the Confrontation Clause was finally made obligatory on the States, Mr. Justice Black for the majority was careful to observe that its guarantee, "like the right against compelled self-incrimination, is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Pointer* v. *Texas*, 380 U. S. 400, 406. Cf. *Dutton* v. *Evans*, 400 U. S. 74, 81.

Likewise, when we applied the Double Jeopardy Clause against the States MR. JUSTICE MARSHALL wrote for the Court that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' *Duncan* v. *Louisiana* . . . the same constitutional standards apply against both the State and Federal Governments." *Benton* v. *Maryland*, 395 U. S. 784, 795. And, the doctrine of coextensive coverage was followed in holding the Speedy Trial Clause applicable to the States. *Klopfer* v. *North Carolina*, 386 U. S. 213, 222.

And, in *Duncan* v. *Louisiana*, 391 U. S. 145, 158 n. 30, in holding the jury trial guarantee binding in state trials, we noted that its prohibitions were to be identical against both the Federal and State Governments. See also *id.*, at 213 (Fortas, J., concurring).

Only once has this Court diverged from the doctrine of coextensive coverage of guarantees brought within the Fourteenth Amendment, and that aberration was later rectified. In *Wolf* v. *Colorado*, 338 U. S. 25, it was held that the Fourth Amendment ban against unreasonable and warrantless searches was enforceable against the States but the Court declined to incorporate the Fourth Amendment exclusionary rule of *Weeks* v. *United States*,

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232 U. S. 383. Happily, however, that gap was partially closed in *Elkins* v. *United States*, 364 U. S. 206, and then completely bridged in *Mapp* v. *Ohio*, 367 U. S. 643. In *Mapp* we observed that "[t]his Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial . . . ." We concluded that "the same rule" should apply where the Fourth Amendment was concerned. *Id.*, at 656. And, later, we made clear that "the standard for obtaining a search warrant is . . . 'the same under the Fourth and Fourteenth Amendments,'" *Aguilar* v. *Texas*, 378 U. S. 108, 110; and that the "standard of reasonableness is the same under the Fourth and Fourteenth Amendments." *Ker* v. *California*, 374 U. S. 23, 33.

It is said, however, that the Sixth Amendment, as applied to the States by reason of the Fourteenth, does not mean what it does in federal proceedings, that it has a "due process" gloss on it, and that that gloss gives the States power to experiment with the explicit or implied guarantees in the Bill of Rights.

Mr. Justice Holmes, dissenting in *Truax* v. *Corrigan*, 257 U. S. 312, 344, and Mr. Justice Brandeis, dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311, thought that the States should be allowed to improvise remedies for social and economic ills. But in that area there are not many "thou shalt nots" in the Constitution and Bill of Rights concerning property rights. The most conspicuous is the Just Compensation Clause of the Fifth Amendment. It has been held applicable with full vigor to the States by reason of the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226.

Do today's decisions mean that States may apply a "watered down" version of the Just Compensation

Clause? Or are today's decisions limited to a paring down of civil rights protected by the Bill of Rights and up until now as fully applicable to the States as to the Federal Government?

These civil rights—whether they concern speech, searches and seizures, self-incrimination, criminal prosecutions, bail, or cruel and unusual punishments extend, of course, to everyone, but in cold reality touch mostly the lower castes in our society. I refer, of course, to the blacks, the Chicanos, the one-mule farmers, the agricultural workers, the offbeat students, the victims of the ghetto. Are we giving the States the power to experiment in diluting their civil rights? It has long been thought that the "thou shalt nots" in the Constitution and Bill of Rights protect everyone against governmental intrusion or overreaching. The idea has been obnoxious that there are some who can be relegated to second-class citizenship. But if we construe the Bill of Rights and the Fourteenth Amendment to permit States to "experiment" with the basic rights of people, we open a veritable Pandora's box. For hate and prejudice are versatile forces that can degrade the constitutional scheme.[3]

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[3] What was said of the impact of *Mapp* v. *Ohio*, 367 U. S. 643, on federalism bears repeating here:

"*Mapp* . . . established no assumption by this Court of supervisory authority over state courts . . . and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. *Mapp* sounded no death knell for our federalism; rather, it echoed the sentiment of *Elkins* v. *United States* [, 364 U. S. 206,] that 'a healthy federalism depends upon the avoidance of needless conflict between state and federal courts' by itself urging that '[f]ederal-state cooperation . . . will be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria* in their approaches." *Ker* v. *California*, 374 U. S. 23, 31.

That, however, is only one of my concerns when we make the Bill of Rights, as applied to the States, a "watered down" version of what that charter guarantees. My chief concern is one often expressed by the late Mr. Justice Black, who was alarmed at the prospect of nine men appointed for life sitting as a super-legislative body to determine whether government has gone too far. The balancing was done when the Constitution and Bill of Rights were written and adopted. For this Court to determine, say, whether one person but not another is entitled to free speech is a power never granted it. But that is the ultimate reach of decisions that let the States, subject to our veto, experiment with rights guaranteed by the Bill of Rights.

I would construe the Sixth Amendment, when applicable to the States, precisely as I would when applied to the Federal Government.

II

The plurality approves a procedure which diminishes the reliability of a jury. First, it eliminates the circumstances in which a minority of jurors (a) could have rationally persuaded the entire jury to acquit, or (b) while unable to persuade the majority to acquit, nonetheless could have convinced them to convict only on a lesser-included offense. Second, it permits prosecutors in Oregon and Louisiana to enjoy a conviction-acquittal ratio substantially greater than that ordinarily returned by unanimous juries.

The diminution of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required either by Oregon or by Louisiana even though the dissident jurors might, if given the chance, be able to convince the majority. Such persua-

sion does in fact occasionally occur in States where the unanimous requirement applies: "In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance." [4] One explanation for this phenomenon is that because jurors are often not permitted to take notes and because they have imperfect memories, the forensic process of forcing jurors to defend their conflicting recollections and conclusions flushes out many nuances which otherwise would go overlooked. This collective effort to piece together the puzzle of historical truth, however, is cut short as soon as the requisite majority is reached in Oregon and Louisiana. Indeed, if a necessary majority is immediately obtained, then no deliberation at all is required in these States. (There is a suggestion that this may have happened in the 10–2 verdict rendered in only 41 minutes in Apodaca's case.) To be sure, in jurisdictions other than these two States, initial majorities normally prevail in the end, but about a tenth of the time the rough-and-tumble of the jury room operates to reverse completely their preliminary perception of guilt or innocence. The Court now extracts from the jury room this automatic check against hasty fact-finding by relieving jurors of the duty to hear out fully the dissenters.

It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity. As mentioned earlier, in Apodaca's case, whatever courtesy dialogue transpired could not have lasted more than 41 minutes. I fail to under-

[4] H. Kalven & H. Zeisel, The American Jury 490 (1966). See also The American Jury: Notes For an English Controversy, 48 Chi. B. Rec. 195 (1967).

stand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.

To be sure, in *Williams* v. *Florida*, 399 U. S. 78, we held that a State could provide a jury less than 12 in number in a criminal trial. We said: "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members." *Id.*, at 101–102.

That rationale of *Williams* can have no application here. *Williams* requires that the change be neither more nor less advantageous to either the State or the defendant. It is said that such a showing is satisfied here since a 3:9 (Louisiana) or 2:10 (Oregon) verdict will result in acquittal. Yet experience shows that the less-than-unanimous jury overwhelmingly favors the States.

Moreover, even where an initial majority wins the dissent over to its side, the ultimate result in unanimous-jury States may nonetheless reflect the reservations of uncertain jurors. I refer to many compromise verdicts on lesser-included offenses and lesser sentences. Thus, even though a minority may not be forceful enough to carry the day, their doubts may nonetheless cause a majority to exercise caution. Obviously, however, in Oregon and Louisiana, dissident jurors will not have the opportunity through full deliberation to temper the opposing faction's degree of certainty of guilt.

The new rule also has an impact on cases in which a unanimous jury would have neither voted to acquit nor

to convict, but would have deadlocked. In unanimous-jury States, this occurs about 5.6% of the time. Of these deadlocked juries, Kalven and Zeisel say that 56% contain either one, two, or three dissenters. In these latter cases, the majorities favor the prosecution 44% (of the 56%) but the defendant only 12% (of the 56%).[5] Thus, by eliminating these deadlocks, Louisiana wins 44 cases for every 12 that it loses, obtaining in this band of outcomes a substantially more favorable conviction ratio (3.67 to 1) than the unanimous-jury ratio of slightly less than two guilty verdicts for every acquittal. H. Kalven & H. Zeisel, The American Jury 461, 488 (Table 139) (1966). By eliminating the one-and-two-dissenting-juror cases, Oregon does even better, gaining 4.25 convictions for every acquittal. While the statutes on their face deceptively appear to be neutral, the use of the nonunanimous jury stacks the truth-determining process against the accused. Thus, we take one step more away from the accusatorial system that has been our proud boast.

It is my belief that a unanimous jury is necessary if the great barricade known as proof beyond a reasonable

[5] The American Jury, *supra*, n. 3, at 460.

Last Vote of Deadlocked Juries

Vote for Conviction	Per Cent
11:1	24
10:2	10
9:3	10
8:4	6
7:5	13
6:6	13
5:7	8
4:8	4
3:9	4
2:10	8
1:11	–
	100%

Number of Juries in Sample—48.

doubt is to be maintained. This is not to equate proof beyond a reasonable doubt with the requirement of a unanimous jury. That would be analytically fallacious since a deadlocked jury does not bar, as double jeopardy, retrial for the same offense. See *Dreyer* v. *Illinois*, 187 U. S. 71. Nevertheless, one is necessary for a proper effectuation of the other. Compare *Mapp* v. *Ohio*, 367 U. S. 643, with *Wolf* v. *Colorado*, 338 U. S. 25.

Suppose a jury begins with a substantial minority but then in the process of deliberation a sufficient number changes to reach the required 9:3 or 10:2 for a verdict. Is not there still a lingering doubt about that verdict? Is it not clear that the safeguard of unanimity operates in this context to make it far more likely that guilt is established beyond a reasonable doubt?

The late Learned Hand said that "as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." [6] At the criminal level that dread multiplies. Any person faced with the awesome power of government is in great jeopardy, even though innocent. Facts are always elusive and often two-faced. What may appear to one to imply guilt may carry no such overtones to another. Every criminal prosecution crosses treacherous ground, for guilt is common to all men. Yet the guilt of one may be irrelevant to the charge on which he is tried or indicate that if there is to be a penalty, it should be of an extremely light character.

The risk of loss of his liberty and the certainty that if found guilty he will be "stigmatized by the conviction" were factors we emphasized in *Winship* in sustaining the requirement that no man should be condemned where there is reasonable doubt about his guilt. 397 U. S., at 363–364.

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[6] 3 Lectures on Legal Topics, Association of Bar of the City of New York 105 (1926).

We therefore have always held that in criminal cases we would err on the side of letting the guilty go free rather than sending the innocent to jail. We have required proof beyond a reasonable doubt as "concrete substance for the presumption of innocence." *Id.*, at 363.

That procedure has required a degree of patience on the part of the jurors, forcing them to deliberate in order to reach a unanimous verdict. Up until today the price has never seemed too high. Now a "law and order" judicial mood causes these barricades to be lowered.

The requirements of a unanimous jury verdict in criminal cases and proof beyond a reasonable doubt are so embedded in our constitutional law and touch so directly all the citizens and are such important barricades of liberty that if they are to be changed they should be introduced by constitutional amendment.

Today the Court approves a nine-to-three verdict. Would the Court relax the standard of reasonable doubt still further by resorting to eight-to-four verdicts, or even a majority rule? Moreover, in light of today's holdings and that of *Williams* v. *Florida*, in the future would it invalidate three-to-two or even two-to-one convictions?

Is the next step the elimination of the presumption of innocence? Mr. Justice Frankfurter, writing in dissent in *Leland* v. *Oregon*, 343 U. S. 790, 802–803, said:

> "It is not unthinkable that failure to bring the guilty to book for a heinous crime which deeply stirs popular sentiment may lead the legislature of a State, in one of those emotional storms which on occasion sweep over our people, to enact that thereafter an indictment for murder, following attempted rape, should be presumptive proof of guilt and cast upon the defendant the burden of proving beyond a reasonable doubt that he did not do the killing. Can there be any doubt that such a statute would go beyond

> the freedom of the States, under the Due Process Clause of the Fourteenth Amendment, to fashion their own penal codes and their own procedures for enforcing them? Why is that so? Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.' Accordingly there can be no doubt, I repeat, that a State cannot cast upon an accused the duty of establishing beyond a reasonable doubt that his was not the act which caused the death of another."

The vast restructuring of American law which is entailed in today's decisions is for political not for judicial action. Until the Constitution is rewritten, we have the present one to support and construe. It has served us well. We lifetime appointees, who sit here only by happenstance, are the last who should sit as a Committee of Revision on rights as basic as those involved in the present cases.

Proof beyond a reasonable doubt and unanimity of criminal verdicts and the presumption of innocence are basic features of the accusatorial system. What we do today is not in that tradition but more in the tradition of the inquisition. Until amendments are adopted setting new standards, I would let no man be fined or imprisoned in derogation of what up to today was indisputably the law of the land.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.*

Readers of today's opinions may be understandably puzzled why convictions by 11–1 and 10–2 jury votes are affirmed in No. 69–5046, when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother POWELL agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments. In that circumstance, it is arguable that the affirmance of the convictions of Apodaca, Madden, and Cooper is not inconsistent with a view that today's decision in No. 69–5046 is a holding that only a unanimous verdict will afford the accused in a state criminal prosecution the jury trial guaranteed him by the Sixth Amendment. In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States,† the Sixth Amendment's jury trial

*[This opinion applies also to No. 69–5046, *Apodaca* v. *Oregon*, *post*, p. 404.]

†See, for example, First Amendment, *Gitlow* v. *New York*, 268 U. S. 652 (1925); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293 (1961); Fourth Amendment, *Ker* v. *California*, 374 U. S. 23 (1963); Fifth Amendment's privilege against self-incrimination, *Malloy* v. *Hogan*, 378 U. S. 1 (1964); Fifth Amendment's Double Jeopardy Clause, *Benton* v. *Maryland*, 395 U. S. 784 (1969); Fifth Amendment's Just Compensation Clause, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897); Sixth Amendment's Speedy Trial Clause, *Klopfer* v. *North*

guarantee, however it is to be construed, has identical application against both State and Federal Governments.

I can add only a few words to the opinions of my Brothers DOUGLAS, STEWART, and MARSHALL, which I have joined. Emotions may run high at criminal trials. Although we can fairly demand that jurors be neutral until they have begun to hear evidence, it would surpass our power to command that they remain unmoved by the evidence that unfolds before them. What this means is that jurors will often enter the jury deliberations with strong opinions on the merits of the case. If at that time a sufficient majority is available to reach a verdict, those jurors in the majority will have nothing but their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion. Even giving all reasonable leeway to legislative judgment in such matters, I think it simply ignores reality to imagine that most jurors in these circumstances would or even could fairly weigh the arguments opposing their position.

It is in this context that we must view the constitutional requirement that all juries be drawn from an accurate cross section of the community. When verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace. In my opinion, the right of all groups in this Nation to participate in the criminal process means the right to have their voices heard. A unanimous verdict vindicates that right. Majority verdicts could destroy it.

Carolina, 386 U. S. 213 (1967); Sixth Amendment's guarantee of jury trial, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); Sixth Amendment's Confrontation Clause, *Pointer* v. *Texas*, 380 U. S. 400 (1965).

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

This case was tried before the announcement of our decision in *Duncan* v. *Louisiana*, 391 U. S. 145. Therefore, unlike *Apodaca* v. *Oregon*, decided today, *post*, p. 404, the Sixth Amendment's guarantee of trial by jury is not applicable here. *DeStefano* v. *Woods*, 392 U. S. 631. But I think the Fourteenth Amendment alone clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict.

The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of the Fourteenth Amendment. That has been the insistent message of this Court in a line of decisions extending over nearly a century. *E. g., Carter* v. *Jury Comm'n*, 396 U. S. 320 (1970); *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Carter* v. *Texas*, 177 U. S. 442 (1900); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure that such participation will be meaningful—the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class.*

The constitutional guarantee of an impartial system of

*And, notwithstanding MR. JUSTICE BLACKMUN's disclaimer, there is nothing in the reasoning of the Court's opinion that would stop it from approving verdicts by 8–4 or even 7–5.

jury selection in a state criminal trial rests on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See, *e. g.*, *Whitus* v. *Georgia*, *supra*, at 549–550; *Carter* v. *Texas*, *supra*, at 447; *Strauder* v. *West Virginia*, *supra*, at 310. Only a jury so selected can assure both a fair criminal trial, see *id.*, at 308–309, and public confidence in its result, cf. *Witherspoon* v. *Illinois*, 391 U. S. 510, 519–520; *In re Winship*, 397 U. S. 358, 364. Today's decision grossly undermines those basic assurances. For only a unanimous jury so selected can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear. See *Strauder* v. *West Virginia*, *supra*, at 309. And community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.

It does not denigrate the system of trial by jury to acknowledge that it is imperfect, nor does it ennoble that system to drape upon a jury majority the mantle of presumptive reasonableness in all circumstances. The Court has never before been so impervious to reality in this area. Its recognition of the serious risks of jury misbehavior is a theme unifying a series of constitutional decisions that may be in jeopardy if today's facile presumption of regularity becomes the new point of departure. Why, if juries do not sometimes act out of passion and prejudice, does the Constitution require the availability of a change of venue? Cf. *Groppi* v. *Wisconsin*, 400 U. S. 505; *Irvin* v. *Dowd*, 366 U. S. 717; *Strauder* v. *West Virginia*, *supra*, at 309. Why, if juries

do not sometimes act improperly, does the Constitution require protection from inflammatory press coverage and *ex parte* influence by court officers? Cf., *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333; *Parker* v. *Gladden*, 385 U. S. 363; *Turner* v. *Louisiana*, 379 U. S. 466. Why, if juries must be presumed to obey all instructions from the bench, does the Constitution require that certain information must not go to the jury no matter how strong a cautionary charge accompanies it? Cf., *e. g.*, *Bruton* v. *United States*, 391 U. S. 123; *Jackson* v. *Denno*, 378 U. S. 368. Why, indeed, should we insist that no man can be constitutionally convicted by a jury from which members of an identifiable group to which he belongs have been systematically excluded? Cf., *e. g.*, *Hernandez* v. *Texas*, 347 U. S. 475.

So deeply engrained is the law's tradition of refusal to engage in after-the-fact review of jury deliberations, however, that these and other safeguards provide no more than limited protection. The requirement that the verdict of the jury be unanimous, surely as important as these other constitutional requisites, preserves the jury's function in linking law with contemporary society. It provides the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice.

I dissent.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.*

Today the Court cuts the heart out of two of the most important and inseparable safeguards the Bill of Rights offers a criminal defendant: the right to submit his case to a jury, and the right to proof beyond a reasonable

*[This opinion applies also to No. 69–5046, *Apodaca* v. *Oregon*, *post*, p. 404.]

doubt. Together, these safeguards occupy a fundamental place in our constitutional scheme, protecting the individual defendant from the awesome power of the State. After today, the skeleton of these safeguards remains, but the Court strips them of life and of meaning. I cannot refrain from adding my protest to that of my Brothers DOUGLAS, BRENNAN, and STEWART, whom I join.

In *Apodaca* v. *Oregon*, the question is too frighteningly simple to bear much discussion. We are asked to decide what is the nature of the "jury" that is guaranteed by the Sixth Amendment. I would have thought that history provided the appropriate guide, and as MR. JUSTICE POWELL has demonstrated so convincingly, history compels the decision that unanimity is an essential feature of that jury. But the majority has embarked on a "functional" analysis of the jury that allows it to strip away, one by one, virtually all the characteristic features of the jury as we know it. Two years ago, over my dissent, the Court discarded as an essential feature the traditional size of the jury. *Williams* v. *Florida*, 399 U. S. 78 (1970). Today the Court discards, at least in state trials, the traditional requirement of unanimity. It seems utterly and ominously clear that so long as the tribunal bears the label "jury," it will meet Sixth Amendment requirements as they are presently viewed by this Court. The Court seems to require only that jurors be laymen, drawn from the community without systematic exclusion of any group, who exercise commonsense judgment.

More distressing still than the Court's treatment of the right to jury trial is the cavalier treatment the Court gives to proof beyond a reasonable doubt. The Court asserts that when a jury votes nine to three for conviction, the doubts of the three do not impeach the verdict of the nine. The argument seems to be that since, under

Williams, nine jurors are enough to convict, the three dissenters are mere surplusage. But there is all the difference in the world between three jurors who are not there, and three jurors who entertain doubts after hearing all the evidence. In the first case we can never know, and it is senseless to ask, whether the prosecutor might have persuaded additional jurors had they been present. But in the second case we know what has happened: the prosecutor has tried and failed to persuade those jurors of the defendant's guilt. In such circumstances, it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a reasonable doubt.

It is said that this argument is fallacious because a deadlocked jury does not, under our law, bring about an acquittal or bar a retrial. The argument seems to be that if the doubt of a dissenting juror were the "reasonable doubt" that constitutionally bars conviction, then it would necessarily result in an acquittal and bar retrial. But that argument rests on a complete *non sequitur*. The reasonable-doubt rule, properly viewed, simply establishes that, as a prerequisite to obtaining a valid conviction, the prosecutor must overcome all of the jury's reasonable doubts; it does not, of itself, determine what shall happen if he fails to do so. That is a question to be answered with reference to a wholly different constitutional provision, the Fifth Amendment ban on double jeopardy, made applicable to the States through the Due Process Clause of the Fourteenth Amendment in *Benton* v. *Maryland*, 395 U. S. 784 (1969).

Under prevailing notions of double jeopardy, if a jury has tried and failed to reach a unanimous verdict, a new trial may be held. *United States* v. *Perez*, 9 Wheat. 579 (1824). The State is free, consistent with the ban on double jeopardy, to treat the verdict of a nonunanimous jury as a nullity rather than as an

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acquittal. On retrial, the prosecutor may be given the opportunity to make a stronger case if he can: new evidence may be available, old evidence may have disappeared, and even the same evidence may appear in a different light if, for example, the demeanor of witnesses is different. Because the second trial may vary substantially from the first, the doubts of the dissenting jurors at the first trial do not necessarily impeach the verdict of a new jury on retrial. But that conclusion is wholly consistent with the view that the doubts of dissenting jurors create a constitutional bar to conviction at the trial that produced those doubts. Until today, I had thought that was the law.

I respectfully reject the suggestion of my Brother POWELL that the doubts of minority jurors may be attributable to "irrationality" against which some protection is needed. For if the jury has been selected properly, and every juror is a competent and rational person, then the "irrationality" that enters into the deliberation process is precisely the essence of the right to a jury trial. Each time this Court has approved a change in the familiar characteristics of the jury, we have reaffirmed the principle that its fundamental characteristic is its capacity to render a commonsense, layman's judgment, as a representative body drawn from the community. To fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests. My dissenting Brothers have pointed to the danger, under a less-than-unanimous rule, of excluding from the process members of minority groups, whose participation we have elsewhere recognized as a constitutional requirement. It should be emphasized, however, that the fencing-out problem goes beyond the problem of identifiable minority groups. The juror whose dissenting voice is unheard

may be a spokesman, not for any minority viewpoint, but simply for himself—and that, in my view, is enough. The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt. I dissent.

APODACA ET AL. *v.* OREGON

CERTIORARI TO THE COURT OF APPEALS OF OREGON

No. 69–5046. Argued March 1, 1971—Reargued January 10, 1972—Decided May 22, 1972

Petitioners, who were found guilty of committing felonies, by less-than-unanimous jury verdicts, which are permitted under Oregon law in noncapital cases, claim that their convictions, upheld on appeal, contravene their right to trial by jury under the Sixth and Fourteenth Amendments. *Held:* The judgment is affirmed. Pp. 410–414, 369–380.

1 Ore. App. 483, 462 P. 2d 691, affirmed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST, concluded that:

1. The Sixth Amendment guarantee of a jury trial, made applicable to the States by the Fourteenth (*Duncan* v. *Louisiana*, 391 U. S. 145), does not require that the jury's vote be unanimous. Pp. 410–412.

(a) The Amendment's essential purpose of "interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen" representative of a cross section of the community, *Williams* v. *Florida*, 399 U. S. 78, 100, is served despite the absence of a unanimity requirement. Pp. 410–411.

(b) Petitioners' argument that the Sixth Amendment requires jury unanimity in order to effectuate the reasonable-doubt standard otherwise mandated by due process requirements is without merit since that Amendment does not require proof beyond a reasonable doubt at all. Pp. 411–412.

2. Jury unanimity is not mandated by the Fourteenth Amendment requirements that racial minorities not be systematically excluded from the jury-selection process; even when racial minority members are on the jury, it does not follow that their views will not be just as rationally considered by the other jury members as would be the case under a unanimity rule. Pp. 412–414.

MR. JUSTICE POWELL concluded that:

1. Although on the basis of history and precedent the Sixth Amendment mandates unanimity in a *federal* jury trial, the Due Process Clause of the Fourteenth Amendment, while requiring States to provide jury trials for serious crimes, does not incor-

porate all the elements of a jury trial within the meaning of the Sixth Amendment and does not require jury unanimity. Oregon's "ten of twelve" rule is not violative of due process. Pp. 369–377.

2. Nor is the Oregon provision inconsistent with the due process requirement that a jury be drawn from a representative cross section of the community as the jury majority remains under the duty to consider the minority viewpoint in the course of deliberation, and the usual safeguards exist to minimize the possibility of jury irresponsibility. Pp. 378–380.

WHITE, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, *ante*, p. 365. POWELL, J., filed an opinion concurring in the judgment, *ante*, p. 366. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *ante*, p. 380. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *ante*, p. 395. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 414. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *ante*, p. 399.

Richard B. Sobol reargued the cause and filed briefs for petitioners.

Jacob B. Tanzer, Solicitor General of Oregon, reargued the cause for respondent. With him on the brief were *Lee Johnson*, Attorney General, and *Thomas H. Denney*, Assistant Attorney General.

Briefs of *amici curiae* urging reversal were filed by *James J. Doherty* and *Marshall J. Hartman* for the National Legal Aid and Defender Association, and by *Norman Dorsen, Melvin L. Wulf*, and *Paul R. Meyer* for the American Civil Liberties Union.

MR. JUSTICE WHITE announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST joined.

Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden were convicted respectively of assault with a deadly weapon, burglary in a dwelling, and

grand larceny before separate Oregon juries, all of which returned less-than-unanimous verdicts. The vote in the cases of Apodaca and Madden was 11–1, while the vote in the case of Cooper was 10–2, the minimum requisite vote under Oregon law for sustaining a conviction.[1] After their convictions had been affirmed by the Oregon Court of Appeals, 1 Ore. App. 483, 462 P. 2d 691 (1969), and review had been denied by the Supreme Court of Oregon, all three sought review in this Court upon a claim that conviction of crime by a less-than-unanimous jury violates the right to trial by jury in criminal cases specified by the Sixth Amendment and made applicable to the States by the Fourteenth. See *Duncan* v. *Louisiana*, 391 U. S. 145 (1968). We granted certiorari to consider this claim, 400 U. S. 901 (1970), which we now find to be without merit.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), we had occasion to consider a related issue: whether the Sixth Amendment's right to trial by jury requires that all juries consist of 12 men. After considering the history of the 12-man requirement and the functions it performs in contemporary society, we concluded that it was not of constitutional stature. We reach the same conclusion today with regard to the requirement of unanimity.

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[1] Ore. Const., Art. I, § 11, reads in relevant part:

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . . ."

I

Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages [2]

[2] The origins of the unanimity rule are shrouded in obscurity, although it was only in the latter half of the 14th century that it became settled that a verdict had to be unanimous. See 1 W. Holdsworth, A History of English Law 318 (1956); Thayer, The Jury and its Development, 5 Harv. L. Rev. (pts. 1 and 2) 249, 295, 296 (1892). At least four explanations might be given for the development of unanimity. One theory is that unanimity developed to compensate for the lack of other rules insuring that a defendant received a fair trial. See L. Orfield, Criminal Procedure from Arrest to Appeal 347–351 (1947); Haralson, Unanimous Jury Verdicts in Criminal Cases, 21 Miss. L. J. 185, 191 (1950). A second theory is that unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position; the argument is that when this technique of afforcement was abandoned, the requirement that one side obtain the votes of all 12 jurors remained. See P. Devlin, Trial by Jury 48–49 (1956); Ryan, Less than Unanimous Jury Verdicts in Criminal Trials, 58 J. Crim. L. C. & P. S. 211, 213 (1967). A third possibility is that unanimity developed because early juries, unlike juries today, personally had knowledge of the facts of a case; the medieval mind assumed there could be only one correct view of the facts, and, if either all the jurors or only a minority thereof declared the facts erroneously, they might be punished for perjury. See T. Plucknett, A Concise History of the Common Law 131 (5th ed. 1956); Thayer, *supra*, at 297. Given a view that minority jurors were guilty of criminal perjury, the development of a practice of unanimity would not be surprising. The final explanation is that jury unanimity arose out of the medieval concept of consent. Indeed, "[t]he word consent (*consensus*) carried with it the idea of *concordia* or unanimity. . . ." M. Clarke, Medieval Representation and Consent 251 (1964). Even in 14th-century Parliaments there is evidence that a majority vote was deemed insufficient to bind the community or individual members of the community to a legal decision, see *id.*, at 335–336; Plucknett, The Lancastrian Constitution, in Tudor Studies 161, 169–170 (R. Seton-Watson ed. 1924); a unanimous decision was preferred. It was only in the 15th century that the decisionmaking process in Parliament became avowedly majoritarian, see 1 K. Pickthorn, Early

and had become an accepted feature of the common-law jury by the 18th century.[3] But, as we observed in *Williams*, "the relevant constitutional history casts considerable doubt on the easy assumption[4] . . . that if a

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Tudor Government: Henry VII, p. 93 (1967), as the ideal of unanimity became increasingly difficult to attain. See Clarke, *supra*, at 266–267. For evidence in 18th-century America of a similar concern that decisions binding on the community be taken unanimously, see Zuckerman, The Social Context of Democracy in Massachusetts, 25 Wm. & Mary Q. (3d ser.) 523, 526–527, 540–544 (1968).

[3] See 3 W. Blackstone, Commentaries *375–376. Four 18th-century state constitutions provided explicitly for unanimous jury verdicts in criminal cases, see N. C. Const. of 1776, Art. IX; Pa. Const. of 1776, Art. IX; Vt. Const. of 1786, Art. XI; Va. Const. of 1776, § 8; while other 18th-century state constitutions provided for trial by jury according to the course of the common law, see Md. Const. of 1776, Art. III, or that trial by jury would remain "inviolate," see Ga. Const. of 1777, Art. LXI; Ky. Const. of 1792, Art. XII, § 6; N. Y. Const. of 1777, Art. XLI; Tenn. Const. of 1796, Art. XI, § 6; be "confirmed," see N. J. Const. of 1776, Art. XXII; or remain "as heretofore." See Del. Const. of 1792, Art. I, § 4; Ky. Const. of 1792, Art. XII, § 6; S. C. Const. of 1790, Art. IX, § 6. See also *Apthorp* v. *Backus*, 1 Kirby 407, 416–417 (Conn. 1788); *Grinnell* v. *Phillips*, 1 Mass. 530, 542 (1805). Although unanimity had not been the invariable practice in 17th-century America, where majority verdicts were permitted in the Carolinas, Connecticut, and Pennsylvania, see *Williams* v. *Florida*, 399 U. S. 78, 98 n. 45 (1970), the explicit constitutional provisions, particularly of States such as North Carolina and Pennsylvania, the apparent change of practice in Connecticut, and the unquestioning acceptance of the unanimity rule by text writers such as St. George Tucker indicate that unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems. See generally Murrin, The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts, in Colonial America: Essays in Politics and Social Development 415 (S. Katz ed. 1971). See also F. Heller, The Sixth Amendment 13–21 (1951).

[4] See *Andres* v. *United States*, 333 U. S. 740, 748 (1948); *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900) (dictum). Cf. *Springville* v. *Thomas*, 166 U. S. 707 (1897); *American Publishing Co.* v. *Fisher*, 166 U. S. 464 (1897).

given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Id.*, at 92–93. The most salient fact in the scanty history of the Sixth Amendment, which we reviewed in full in *Williams*, is that, as it was introduced by James Madison in the House of Representatives, the proposed Amendment provided for trial

> "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ." 1 Annals of Cong. 435 (1789).

Although it passed the House with little alteration, this proposal ran into considerable opposition in the Senate, particularly with regard to the vicinage requirement of the House version. The draft of the proposed Amendment was returned to the House in considerably altered form, and a conference committee was appointed. That committee refused to accept not only the original House language but also an alternate suggestion by the House conferees that juries be defined as possessing "the accustomed requisites." Letter from James Madison to Edmund Pendleton, Sept. 23, 1789, in 5 Writings of James Madison 424 (G. Hunt ed. 1904). Instead, the Amendment that ultimately emerged from the committee and then from Congress and the States provided only for trial

> "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

As we observed in *Williams*, one can draw conflicting inferences from this legislative history. One possible inference is that Congress eliminated references to unanimity and to the other "accustomed requisites" of the jury because those requisites were thought already to be

implicit in the very concept of jury. A contrary explanation, which we found in *Williams* to be the more plausible, is that the deletion was intended to have some substantive effect. See 399 U. S., at 96–97. Surely one fact that is absolutely clear from this history is that, after a proposal had been made to specify precisely which of the common-law requisites of the jury were to be preserved by the Constitution, the Framers explicitly rejected the proposal and instead left such specification to the future. As in *Williams*, we must accordingly consider what is meant by the concept "jury" and determine whether a feature commonly associated with it is constitutionally required. And, as in *Williams*, our inability to divine "the intent of the Framers" when they eliminated references to the "accustomed requisites" requires that in determining what is meant by a jury we must turn to other than purely historical considerations.

II

Our inquiry must focus upon the function served by the jury in contemporary society. Cf. *Williams* v. *Florida, supra*, at 99–100. As we said in *Duncan*, the purpose of trial by jury is to prevent oppression by the Government by providing a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U. S., at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . ." *Williams* v. *Florida, supra*, at 100. A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to de-

liberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit.[5] But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

III

Petitioners nevertheless argue that unanimity serves other purposes constitutionally essential to the continued operation of the jury system. Their principal contention is that a Sixth Amendment "jury trial" made mandatory on the States by virtue of the Due Process Clause of the Fourteenth Amendment, *Duncan* v. *Louisiana, supra,* should be held to require a unanimous jury verdict in order to give substance to the reasonable-doubt standard otherwise mandated by the Due Process Clause. See *In re Winship,* 397 U. S. 358, 363–364 (1970).

We are quite sure, however, that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases. The reasonable-doubt standard developed separately from both the jury trial and the unanimous verdict. As the Court noted in the *Winship* case, the rule requiring proof of crime beyond a reasonable doubt did not crystallize in this country until after the Constitution was adopted. See

[5] The most complete statistical study of jury behavior has come to the conclusion that when juries are required to be unanimous, "the probability that an acquittal minority will hang the jury is about as great as that a guilty minority will hang it." H. Kalven & H. Zeisel, The American Jury 461 (1966).

id., at 361.[6] And in that case, which held such a burden of proof to be constitutionally required, the Court purported to draw no support from the Sixth Amendment.

Petitioners' argument that the Sixth Amendment requires jury unanimity in order to give effect to the reasonable-doubt standard thus founders on the fact that the Sixth Amendment does not require proof beyond a reasonable doubt at all. The reasonable-doubt argument is rooted, in effect, in due process and has been rejected in *Johnson* v. *Louisiana*, *ante*, p. 356.

IV

Petitioners also cite quite accurately a long line of decisions of this Court upholding the principle that the Fourteenth Amendment requires jury panels to reflect a cross section of the community. See, *e. g.*, *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). They then contend that unanimity is a necessary precondition for effective application of the cross-section require-

[6] For the history of the reasonable-doubt requirement, see generally C. McCormick, Evidence § 321 (1954); 9 J. Wigmore, Evidence § 2497 (3d ed. 1940); May, Some Rules of Evidence—Reasonable Doubt in Civil and Criminal Cases, 10 Am. L. Rev. 642, 651–660 (1876). (See 69 U. S. L. Rev. 169, 172 (1935).) According to May and McCormick, the requirement of proof beyond a reasonable doubt first crystallized in the case of *Rex* v. *Finny*, a high treason case tried in Dublin in 1798 and reported in 1 L. MacNally, Rules of Evidence on Pleas of the Crown *4 (1811). Confusion about the rule persisted in the United States in the early 19th century, where it was applied in civil as well as criminal cases, see, *e. g.*, *Ropps* v. *Barker*, 21 Mass. (4 Pick.) 239, 242 (1826); it was only in the latter half of the century that the reasonable-doubt standard ceased to be applied in civil cases, see *Ellis* v. *Buzzell*, 60 Me. 209 (1872), and that American courts began applying it in its modern form in criminal cases. See *Commonwealth* v. *Webster*, 59 Mass. (5 Cush.) 295, 320 (1850). See generally May, *supra*.

ment, because a rule permitting less than unanimous verdicts will make it possible for convictions to occur without the acquiescence of minority elements within the community.

There are two flaws in this argument. One is petitioners' assumption that every distinct voice in the community has a right to be represented on every jury and a right to prevent conviction of a defendant in any case. All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded. See *Swain* v. *Alabama*, 380 U. S. 202, 208–209 (1965); *Cassell* v. *Texas*, 339 U. S. 282, 286–287 (1950); *Akins* v. *Texas*, 325 U. S. 398, 403–404 (1945); *Ruthenberg* v. *United States*, 245 U. S. 480 (1918). No group, in short, has the right to block convictions; it has only the right to participate in the overall legal processes by which criminal guilt and innocence are determined.

We also cannot accept petitioners' second assumption—that minority groups, even when they are represented on a jury, will not adequately represent the viewpoint of those groups simply because they may be outvoted in the final result. They will be present during all deliberations, and their views will be heard. We cannot assume that the majority of the jury will refuse to weigh the evidence and reach a decision upon rational grounds, just as it must now do in order to obtain unanimous verdicts, or that a majority will deprive a man of his liberty on the basis of prejudice when a minority is presenting a reasonable argument in favor of acquittal. We simply find no proof for the notion that a majority will disregard its instructions and cast its votes for guilt

or innocence based on prejudice rather than the evidence.

We accordingly affirm the judgment of the Court of Appeals of Oregon.

It is so ordered.

[For concurring opinion of BLACKMUN, J., see *ante*, p. 365.]

[For opinion of POWELL, J., concurring in judgment, see *ante*, p. 366.]

[For dissenting opinion of DOUGLAS, J., see *ante*, p. 380.]

[For dissenting opinion of BRENNAN, J., see *ante*, p. 395.]

[For dissenting opinion of MARSHALL, J., see *ante*, p. 399.]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In *Duncan* v. *Louisiana*, 391 U. S. 145, the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly "yes," as my Brother POWELL has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.*

Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. See *Andres* v. *United States*, 333 U. S. 740, 748; *Patton* v. *United States*, 281 U. S.

*See *ante*, at 369–371 (POWELL, J., concurring in judgment).

276, 288; *Hawaii* v. *Mankichi,* 190 U. S. 197, 211–212; *Maxwell* v. *Dow,* 176 U. S. 581, 586; *Thompson* v. *Utah,* 170 U. S. 343, 351, 353; cf. 2 J. Story, Commentaries on the Constitution § 1779 n. 2 (5th ed. 1891).

I would follow these settled Sixth Amendment precedents and reverse the judgment before us.

CAPLIN, TRUSTEE *v.* MARINE MIDLAND GRACE TRUST CO. OF NEW YORK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70-220. Argued March 28, 1972—Decided May 22, 1972

Petitioner, the trustee of Webb & Knapp, Inc., under Chapter X of the Bankruptcy Act, does not have standing to assert, on behalf of holders of debentures issued by Webb & Knapp, claims of misconduct by an indenture trustee. Pp. 417–435.

439 F. 2d 118, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, WHITE, and BLACKMUN, JJ., joined, *post*, p. 435.

Charles H. Miller argued the cause for petitioner. With him on the briefs were *Mortimer M. Caplin, pro se, Henry Winestine,* and *Leon E. Irish.*

John W. Dickey argued the cause and filed a brief for respondent.

David Ferber argued the cause for the Securities and Exchange Commission urging reversal. With him on the briefs were *Solicitor General Griswold, Samuel Huntington, G. Bradford Cook,* and *Paul Gonson.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The sole issue in this case is whether petitioner, the trustee in reorganization of Webb & Knapp, Inc., has standing under Chapter X of the Bankruptcy Act, 52 Stat. 883, 11 U. S. C. § 501 *et seq.*, to assert, on behalf of persons holding debentures issued by Webb & Knapp, claims of misconduct by an indenture trustee. The United States District Court for the Southern District

of New York held that petitioner lacked the requisite standing, and the United States Court of Appeals for the Second Circuit affirmed *en banc*, with two judges dissenting, 439 F. 2d 118 (1971).[1] We granted certiorari, 404 U. S. 982 (1971), and we now affirm the decision of the Court of Appeals.

I

Webb & Knapp and its numerous subsidiaries were engaged in various real estate activities in both the United States and Canada. In 1954, the corporation executed an indenture with respondent, the Marine Midland Trust Company of New York (Marine), that provided for the issuance by Webb & Knapp of 5% debentures in the total amount of $8,607,600. A critical part of the indenture was the promise by Webb & Knapp that neither it nor any company affiliated with it [2] would incur or assume "any indebtedness resulting from money borrowed or from the purchase of real property or interests in real property . . . or purchase any real property or interests in real property" unless the company's consolidated tangible assets, as defined in the indenture, equaled 200% of certain liabilities, after giving effect to the contemplated indebtedness or purchase.[3]

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[1] The District Court delivered three separate opinions in this case. They are unreported, but are included in the appendix prepared by the parties at 58a–70a. The Court of Appeals heard the case *en banc* after a panel of three judges determined that it was inclined to overrule the case on which the District Court had placed almost exclusive reliance. 439 F. 2d 118.

[2] Those companies in the affiliated group include any corporation that was entitled to be included in a consolidated tax return of Webb & Knapp. See 26 U. S. C. § 1502. Section 1.1 of the Indenture gave Webb & Knapp authority to consider other companies as affiliates if it chose to do so.

[3] Indenture of June 1, 1954, Webb & Knapp, Inc., to the Marine Midland Trust Company of New York § 3.6 (hereinafter referred to as Indenture).

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By requiring the company to maintain an asset-liability ratio of 2:1, the indenture sought to protect debenture purchasers by providing a cushion against any losses that the company might suffer in the ordinary course of business. In order to demonstrate continuing compliance with the requirements of the indenture, Webb & Knapp covenanted to file an annual certificate with Marine stating whether the corporation (debtor) had defaulted on any of its responsibilities under the indenture during the preceding year.[4]

In its role as indenture trustee, Marine undertook "in case of default . . . to exercise such of the rights and powers vested in it by [the] Indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs."[5] This undertaking was qualified by language in the indenture that permitted the trustee to rely on the accuracy of certificates or reports of Webb & Knapp, in the absence of bad faith.[6]

Commencing in 1959, Webb & Knapp sustained substantial financial losses in every year.[7] Finally, on May 7, 1965, Marine filed a petition in district court seeking the involuntary reorganization of Webb & Knapp under Chapter X of the Bankruptcy Act, 11 U. S. C. § 501 *et seq.* Pursuant to § 208 of Chapter X, 11 U. S. C. § 608, the Securities and Exchange Commission inter-

[4] Indenture § 3.11.

[5] Indenture § 10.1 (a). This was also a statutory duty. See 15 U. S. C. § 77*ooo*.

[6] Indenture § 10.1 (d).

[7] Webb & Knapp showed a loss for tax purposes each year, although the company did show a gain on its books for 1961 attributable to a write-up of property owned by a wholly owned subsidiary of a company in which Webb & Knapp held 50% of the stock.

vened on May 10, 1965.[8] Marine's petition was subsequently approved and petitioner was appointed trustee in reorganization on May 18, 1965.

With the approval of the District Court, petitioner exercised the powers conferred upon him by 11 U. S. C. § 567 and undertook an extensive investigation of the financial affairs of Webb & Knapp. His investigation showed that the company had total assets of $21,538,621 and total liabilities of $60,036,164, plus contingent tax liabilities of $29,400,000. Included among the liabilities were the 1954 debentures in the principal amount of $4,298,200 plus interest subsequent to the inception of the reorganization proceeding.[9]

The investigation led petitioner to conclude that Marine had either willfully or negligently failed to fulfill its obligations under the indenture. Petitioner supported his conclusion with the following allegations: that from 1954 to 1964, Webb & Knapp's yearly certificates of compliance with the 2:1 asset-liability ratio mandated by the indenture were fraudulent, because they were based on grossly overvalued appraisals of real estate property; that from 1958 to 1964, Webb & Knapp did not have sufficient assets to comply with the terms of the indenture; that Marine should have known or did know of the inflated appraisals; and that because Marine permitted Webb & Knapp to violate the indenture by engaging in transactions that its impaired asset-liability

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[8] The SEC has supported petitioner throughout this litigation. The agency is "an unnamed respondent before this Court." See *Protective Committee* v. *Anderson*, 390 U. S. 414, 420 n. 3 (1968). When referring to arguments made by petitioner, this opinion assumes, unless otherwise stated, that the SEC has made the same arguments.

[9] The difference between this amount and the amount of the debentures originally issued represents the amount of the principal that Webb & Knapp had repaid.

ratio forbade, Webb & Knapp suffered great financial losses.[10]

Having obtained the approval of the District Court, petitioner filed an independent action on behalf of the debenture holders against Marine seeking to recover the principal amount of the outstanding debentures as damages for Marine's alleged bad-faith failure to compel compliance with the terms of the indenture by Webb & Knapp. Petitioner also filed a counterclaim in the same amount against Marine in the reorganization proceeding in which Marine had previously filed a claim for services rendered. In the reorganization proceeding, petitioner also filed an objection to the claim for services rendered, on the ground that even if petitioner could not obtain an affirmative recovery against Marine on behalf of the bondholders, he could at least raise Marine's improper conduct as a reason why the claim for services rendered should be denied.[11] Finally, petitioner moved to compel an accounting by Marine.

Marine moved to dismiss the independent action and the counterclaim, moved to strike the objection to the claim for services rendered, and opposed the motion to compel an accounting. The District Court found that petitioner had no standing in his capacity as a trustee in reorganization under Chapter X of the Bankruptcy Act to raise claims of misconduct by an indenture trustee on behalf of debenture holders and granted both of Marine's motions to dismiss. Viewing the motion to compel an accounting as merely a third vehicle to raise the same

[10] These are merely allegations of petitioner, not findings of the lower courts. Because the District Court and the Court of Appeals held that petitioner had no standing, they had no occasion to consider the validity of the allegations.

[11] In its capacity as indenture trustee, Marine also filed a claim on behalf of all the debenture holders for the unpaid principal on the debentures.

claim on behalf of the debenture holders, the District Court denied that motion also. Only petitioner's objection to the claim for services rendered was left standing.[12] Petitioner appealed the dismissal of his claims and the denial of his motion for an accounting to the Court of Appeals. Marine filed a cross-appeal from the denial of its motion to strike petitioner's objection to the claim for services rendered. The Court of Appeals affirmed the decision of the District Court in its entirety.

II

The issue confronting us has never before been presented to this Court. It is an issue that has only rarely been presented to other courts, and on those rare occasions, it has caused even the most able jurists to disagree. The first time the issue arose was in *Clarke* v. *Chase National Bank*, 137 F. 2d 797 (CA2 1943). Judge Augustus Hand wrote the opinion of the court holding that a trustee in reorganization did not have standing to sue a third party on behalf of bondholders. Judge Learned Hand disagreed and dissented. It is this decision that the lower courts found controlling in the instant case. The *Clarke* case is, in fact, the only other case in which the issue that is raised here was squarely presented.[13]

[12] This objection differs from the other claims in one respect: *i. e.*, it is an attempt to preserve the remaining assets of the debtor for all creditors other than Marine, whereas the other claims represent an attempt by the petitioner to increase the assets of the debtor for the benefit of a specific class of creditors, the debenture holders. Although Marine appealed the ruling of the District Court denying its motion to strike the objection, it did not seek review here of the decision of the Court of Appeals affirming the District Court on this issue. This issue is, therefore, not before us, and we offer no opinion on the propriety of the lower courts' ruling.

[13] Petitioner and the two dissenting judges in the Court of Appeals argue that the issue was presented in *Prudence-Bonds Corp.* v. *State Street Trust Co.*, 202 F. 2d 555 (CA2), cert. denied, 346 U. S. 835

The issue is a difficult one, and, as we point out later, it is one that is capable of resolution by explicit congressional action. Lacking a specific legislative statement on this issue, we must resolve it as best we can by examining the nature of Chapter X proceedings, the role of the trustee in reorganization, and the way in which standing to sue on behalf of debenture holders would affect or change that role.

Chapter X, enacted in 1938, stemmed from a comprehensive SEC study that disclosed widespread abuses under the then-existing provisions for business reorganizations. See Securities and Exchange Commission, Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1937–1940). This same study gave birth the following year to the Trust Indenture Act of 1939, 53 Stat. 1149, 15 U. S. C. § 77aaa *et seq.*, which is discussed *infra*.

In enacting Chapter X, Congress had protection of public investors primarily in mind. *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594 (1965). "The aims of Chapter X . . . were to afford greater protection to creditors and stockholders by providing greater judicial control over the entire proceedings and impartial and expert administrative assistance in corporate reorganizations through appointment of a disinterested trustee and the active participation of the SEC." *Id.*, at 604. In

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(1953), and that the decision of the court in that case by Judge Learned Hand overruled *Clarke* v. *Chase National Bank*, 137 F. 2d 797 (CA2 1943), *sub silentio*. They also argue that the issue was presented and decided contrary to *Clarke* in *In re Solar Manufacturing Corp.*, 200 F. 2d 327 (CA3 1952), cert. denied *sub nom. Marine Midland Trust Co.* v. *McGirl*, 345 U. S. 940 (1953). But, the majority of the Court of Appeals found these cases to be distinguishable, and Marine urges that the majority was correct. We do not intend to become enmeshed in this controversy and merely indicate its existence.

contradistinction to a bankruptcy proceeding where liquidation of a corporation and distribution of its assets is the goal, a Chapter X proceeding is for purposes of rehabilitating the corporation and reorganizing it. *Ibid.* Chapter X proceedings are not limited to insolvent corporations but are open to those corporations that are solvent in the bankruptcy (asset-liability) sense but are unable to meet their obligations as they mature. *United States* v. *Key*, 397 U. S. 322, 329 (1970); 11 U. S. C. § 530 (1).

The trustee in reorganization is the center of the statutory scheme. H. R. Rep. No. 1409, 75th Cong., 1st Sess., 43, 44. Title 11 U. S. C. § 567 gives the trustee broad powers:

> "The trustee upon his appointment and qualification—
>
> "(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;
>
> "(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;
>
> "(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;
>
> . . . . .
>
> "(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and

the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the judge may designate; and

"(6) shall give notice to the creditors and stockholders that they may submit to him suggestions for the formulation of a plan, or proposals in the form of plans, within a time therein named."

Title 11 U. S. C. § 587 expands these powers:

"Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and, if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor."

The powers given a trustee appointed under § 72 are set forth in a footnote.[14]

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[14] Title 11 U. S. C. § 110 gives the trustee title to the following "property":

"(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and

Petitioner argues that these powers are broad enough to encompass a suit on behalf of debenture holders against an indenture trustee who has acted in bad faith, and who has, therefore, violated the indenture and the Trust Indenture Act of 1939, 15 U. S. C. § 77aaa *et seq.*

As pointed out above, the Trust Indenture Act was passed one year after Chapter X was enacted. Prior to its enactment, indenture trustees immunized themselves from any liability for either deliberate or negligent misconduct by writing exculpatory provisions into the indenture. Even in cases where misconduct by the indenture trustee was the proximate cause of injury to debenture holders, they found themselves impotent under the terms of most indentures to take action against the trustee. See generally 2 L. Loss, Securities Regulation 719–725 (2d ed. 1961). This problem and others are specifically mentioned in 15 U. S. C. § 77bbb as establishing a necessity for regulation.

The regulation provided by the Act takes many forms. 15 U. S. C. § 77eee requires that whenever securities covered by the Trust Indenture Act are also covered by the registration provisions of the Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.*, certain information about the indenture trustee and the terms of the in-

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sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this title, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court."

denture must be included in the registration statement. Title 15 U. S. C. § 77ggg provides that when securities are not registered under the 1933 Act but are covered by the Trust Indenture Act, the indenture must be "qualified" by the SEC before it is legal to sell the securities. Standards for eligibility and disqualification of a trustee are established by 15 U. S. C. § 77jjj, and the duties and responsibilities of a trustee are enumerated in 15 U. S. C. § 77*ooo*.[15]

The indenture giving rise to this litigation was qualified by the SEC pursuant to the Trust Indenture Act of 1939. By alleging that the indenture trustee negligently or intentionally failed to prevent Webb & Knapp from violating the terms of the indenture, petitioner clearly alleges a violation of the 1939 legislation, 15 U. S. C. § 77*ooo*.[16] But the question remains whether petitioner is a proper party to take corrective action.[17]

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[15] The SEC is given general supervisory powers over indentures in various sections of the Trust Indenture Act. See, *e. g.*, 15 U. S. C. §§ 77ddd (c), (d), (e); 77eee (a), (c); 77ggg; 77sss; 77ttt; 77uuu. In addition, 15 U. S. C. § 77hhh provides that the SEC may order consolidation of reports or certificates filed under the Trust Indenture Act with information or documents filed under the Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 48 Stat. 881, 15 U. S. C. § 78a *et seq.*, the Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. § 79 *et seq.*

[16] The provisions of the indenture discussed previously comply with the requirements of 15 U. S. C. § 77*ooo*. While the indenture trustee is not permitted by the statute to exculpate himself from liability for noncompliance with the indenture, the indenture trustee may rely in good faith on certificates or reports filed pursuant to the indenture and in compliance with the provisions thereof.

[17] We assume, *arguendo*, that violation of 15 U. S. C. § 77*ooo* would give rise to a cause of action against an indenture trustee by debenture holders. If there is a cause of action, 15 U. S. C. § 77vvv would seem to give federal courts jurisdiction. The Court of Appeals inferred that such suits would be proper, 439 F. 2d, at 123 n. 5, but did not decide the point. Since we conclude that even

Petitioner urges that the reorganization trustee is in a far better position than debt investors to discover and to prosecute claims based on the alleged failure of an indenture trustee to live up to the provisions of the indenture. He points to 11 U. S. C. § 567, set forth *supra*, and emphasizes that not only does the reorganization trustee have possession of the records of the debtor, but he also has a statutory duty to investigate the debtor's affairs and to "report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate." Reference is made, too, to 15 U. S. C. § 77bbb (a)(1), which states that one of the problems Congress saw with respect to misconduct by indenture trustees was that "(A) individual action by . . . investors for the purpose of protecting and enforcing their rights is rendered impracticable by reason of the disproportionate expense of taking such action, and (B) concerted action by such investors in their common interest through representatives of their own selection is impeded by reason of the wide dispersion of such investors through many States, and by reason of the fact that information as to the names and addresses of such investors generally is not available to such investors." [18]

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if such suits may be brought, petitioner lacks standing to bring them, we do not decide the question.

[18] It should be noted that the Trust Indenture Act of 1939 was enacted on August 3, 1939. The Federal Rules of Civil Procedure were not even one year old. They were adopted by this Court on December 20, 1937, and they became effective on September 16, 1938, 308 U. S. 647. The class action was a comparatively recent phenomenon with respect to damage actions and it was not tremendously helpful in the early days. See, *e. g.*, Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L. J. 551, 570–576 (1937); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941). It could not be said that the class action was an efficacious remedy in 1939.

Finally, petitioner asserts that to give him standing to sue on behalf of debenture holders will not encourage vexatious litigation or unduly deplete the resources of the debtor that he has been appointed to reorganize. He supports the first half of this proposition by noting that any action he takes is subject to the supervision of the District Court and to intervention by the SEC. The second half of the proposition finds support in the argument discussed above that petitioner already has a duty of investigation and that the minimal additional burden of prosecuting a lawsuit will not be great.

At first blush, petitioner's theory, adopted in the opinion of the dissenters in the Court of Appeals, seems reasonable. But, there are three problems with petitioner's argument and these problems require that his position be rejected.

First, Congress has established an elaborate system of controls with respect to indenture trustees and reorganization proceedings, and nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders. The language, in fact, indicates that Congress had no such intent in mind. The statute, 11 U. S. C. § 567 (3), gives the trustee the right, and indeed imposes the duty, to investigate fraud and misconduct and to report to the judge the potential causes of action "available to the estate." Even assuming that this section is read as if the quoted words were not present, and that it authorizes a trustee in reorganization to report whether he believes an indenture trustee has violated a duty to third-party debenture holders, there is nothing in the section that enables him to collect money not owed to the estate. Nor is there anything in 11 U. S. C. § 110, set forth in relevant part in footnote 14, *supra*, that gives him this authority. His task is simply to "collect and reduce to

money the property of the estates for which [he is trustee]." 11 U. S. C. § 75.

The only support petitioner finds in the relevant statutes is in that portion of 11 U. S. C. § 587 which gives reorganization trustees the additional rights that a "receiver in equity would have if appointed by a court of the United States for the property of the debtor." Petitioner relies on *McCandless* v. *Furlaud,* 296 U. S. 140 (1935), to support the proposition that a receiver in equity may sue third parties on behalf of bondholders. But, the opinion of the Court by Mr. Justice Cardozo clearly emphasizes that the receiver in that case was suing on behalf of the corporation, not third parties; he was simply stating the same claim that the corporation could have made had it brought suit prior to entering receivership.[19] The debtor corporation makes no such claim in this case. See generally 2 R. Clark, Law and Practice of Receivers § 362, at 619 (3d ed. 1959).

This brings us to the second problem with petitioner's argument. Nowhere does petitioner argue that Webb & Knapp could make any claim against Marine. Indeed, the conspicuous silence on this point is a tacit admission that no such claim could be made.[20] Assuming that

[19] This point is especially clear in light of the fact that the Court split 5–4 on whether *Old Dominion Copper Co.* v. *Lewisohn,* 210 U. S. 206 (1908) (Holmes, J.), was binding in *McCandless* v. *Furlaud.* The issue in the controversial *Old Dominion* case was whether *a corporation* had a cause of action against promoter-director-stockholders.

[20] If petitioner could sue on behalf of Webb & Knapp, the statute that requires that he report possible causes of action to the court would require mention of this cause of action. Moreover, petitioner has brought every conceivable claim that is available to him as trustee. Not only has he brought this action against the indenture trustee, but he has also sued former officers of Webb & Knapp charging them with waste. Brief for SEC 5–6. Certain settlements have apparently been made in some of these other actions. Brief for Respondent 45 n. 18.

petitioner's allegations of misconduct on the part of the indenture trustee are true, petitioner has at most described a situation where Webb & Knapp and Marine were *in pari delicto*. Whatever damage the debenture holders suffered, under petitioner's theory Webb & Knapp is as much at fault as Marine, if not more so. A question would arise, therefore, whether Marine would be entitled to be subrogated to the claims of the debenture holders. The Court of Appeals thought that subrogation would be required, 439 F. 2d, at 122.

If the Court of Appeals is correct, it is then difficult to see what advantage there is in giving petitioner standing to sue, for as Chief Judge Friendly noted in his opinion for the court below:

> "It is necessary in the first instance to consider what effect a recovery by the Chapter X Trustee would have on the reorganization. On a superficial view this might seem substantial—if, for example, the Chapter X Trustee were to achieve a complete recovery, the debenture holders would be paid off and it might seem there would be that much more for the other creditors and the stockholders. But this pleasant prospect speedily evaporates when the law of subrogation is brought into play. As a result of subrogation, Marine would simply be substituted for the debenture holders as the claimant. Cf. ALI, Restatement of Security § 141 (1941). If the Chapter X Trustee recovered judgment in a lesser amount, the claim of the debenture holders would still be provable in full, with the division of the proceeds between them and Marine dependent upon the results of the reorganization, and other creditors or stockholders would not be affected." 439 F. 2d, at 122.

Even if the Court of Appeals is incorrect in its view of the propriety of subrogation under the facts of this case,

the fact remains that in every reorganization there is going to be a question of how much the trustee in reorganization should be permitted to recover on behalf of the debenture holders. The answer is, of course, whatever he cannot recoup from the corporation. Once this is recognized, the wisdom of Judge Augustus Hand in *Clarke* v. *Chase National Bank*, 137 F. 2d, at 800, becomes readily apparent:

> "Each creditor, including the debenture-holders, can prove the full amount of his claim, and only to the extent that a debenture-holder fails to satisfy it from the bankruptcy estate will he suffer a loss which he can assert against the defendant through its failure to enforce the negative covenants."

In other words, debenture holders will not be able to recover damages from the indenture trustee until the reorganization is far enough along so that a reasonable approximation can be made as to the extent of their losses, if any. It is difficult to see precisely why it is at that point that the trustee in reorganization should represent the interests of the debenture holders, who are capable of deciding for themselves whether or not it is worthwhile to seek to recoup whatever losses they may have suffered by an action against the indenture trustee. Petitioner appears to concede that any suit by debenture holders would not affect the interests of other parties to the reorganization, assuming that the Court of Appeals is correct on the subrogation point. It would seem, therefore, that the debenture holders, the persons truly affected by the suit against Marine, should make their own assessment of the respective advantages and disadvantages, not only of litigation, but of various theories of litigation.

This brings us to the third problem with petitioner's argument: *i. e.*, a suit by him on behalf of debenture holders may be inconsistent with any independent actions

that they might bring themselves. Petitioner and the SEC make very plain their position that a suit by the trustee in reorganization does not pre-empt suits by individual debenture holders. They maintain, however, that it would be unlikely that such suits would be brought since the debenture holders could reasonably expect that the trustee would vigorously prosecute the claims of all debt investors. But, independent actions are still likely because it is extremely doubtful that the trustee and all debenture holders would agree on the amount of damages to seek, or even on the theory on which to sue.[21] Moreover, if the indenture trustee wins the suit brought by the trustee in reorganization, unless the debenture holders are bound by that victory, the proliferation of litigation that petitioner seeks to avoid would then ensue. Finally, a question would arise as to who was bound by any settlement.[22]

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[21] Three private actions have been brought by debenture holders against Marine, one in federal court and two in state court. See Brief for Petitioner 21 n. 9. These suits make the same claims made by the petitioner in the instant case, as well as others which he has not made, including alleged violations of the securities laws.

The trustee may well have interests that differ from those of the bondholders. For example, petitioner has sued not only Marine, but also the former officers of Webb & Knapp. See n. 20, *supra*. In settling the suits brought against the officers, petitioner may well take positions that conflict with those he would take in a suit against Marine. The conflict may at times be unfavorable to the debenture holders. One answer obviously is that the District Court and the SEC can take action to prevent any such conflict from developing, *e. g.*, by denying the trustee in reorganization the right to sue on behalf of debenture holders in selected cases. The problem with this answer is that the conflict may not appear until the suit is well under way. In such a case the debenture holders might regret placing their confidence in the trustee.

[22] Chapter X, 11 U. S. C. § 616 (2), provides that a plan for reorganization "may deal with all or any part of the property of the debtor." It also provides that the plan "may include provisions for the settlement or adjustment of claims belonging to the debtor

Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions, avoids some of these difficulties. It is surely a powerful remedy and one that is available to all debenture holders.[23] Some of the factors that formerly deterred such actions have been changed by the Trust Indenture Act of 1939. Title 15 U. S. C. § 77*lll*, for example, now requires that the debtor corporation maintain lists of debenture holders that it must turn over to the indenture trustees at regular intervals. Such lists are available to the individual de-

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or to the estate." 11 U. S. C. § 616 (13). Despite these provisions, petitioner urges, in effect, that he can settle a suit on behalf of bondholders without binding them to the settlement. Reply Brief for Petitioner 7–8. But, as pointed out in the text, *supra*, petitioner only has authority to pursue claims belonging to the estate. Petitioner is thus caught on the horns of a dilemma: either he is incorrect in asserting that the statutory definition of duties should be read so broadly as to allow a trustee in reorganization to treat claims by debenture holders against third parties as sufficiently related to the estate that the trustee may sue on behalf of the debenture holders; or he is correct, and § 616 would appear to permit him to bind the debenture holders to a settlement. Even if petitioner can have it both ways, his inability to bind the persons on whose behalf he sues undercuts the utility of his suing. Because the debenture holders could bring a class action and bind all members of the class, they can make a binding settlement and avoid lengthy and expensive litigation. Petitioner cannot make such a settlement. Moreover, if a reorganization trustee does settle a suit that he has brought on behalf of debenture holders, he may find that rather than serving as their representative, he is forced to oppose their interests when they bring independent actions to recover more than the settlement figure. In this event, the reorganization trustee would be forced to justify his settlement, and he would theoretically join the indenture trustee in opposing the action of the debenture holders. He would find himself on both sides of the same transaction.

[23] Again we assume, *arguendo*, that the Trust Indenture Act gives a right of action to debenture holders under these circumstances. Obviously, if the debenture holders themselves have no cause of action, their surrogate is in no better position.

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benture holders upon request. Debenture holders would also be able to take advantage of any information obtained by the trustee in reorganization as a result of the investigation which the statute requires that he make. In addition, petitioner himself maintains that counsel fees would be recoverable if the action was successful. Brief for Petitioner 20; cf. 15 U. S. C. § 77nnn.

Thus, there is no showing whatever that by giving petitioner standing to sue on behalf of the debenture holders we would reduce litigation. On the contrary, there is every indication that litigation would be increased, or at least complicated.

III

For the reasons discussed above we conclude that petitioner does not have standing to sue an indenture trustee on behalf of debenture holders. This does not mean that it would be unwise to confer such standing on trustees in reorganization. It simply signifies that Congress has not yet indicated even a scintilla of an intention to do so, and that such a policy decision must be left to Congress and not to the judiciary.

Congress might well decide that reorganizations have not fared badly in the 34 years since Chapter X was enacted and that the *status quo* is preferable to inviting new problems by making changes in the system. Or, Congress could determine that the trustee in a reorganization was so well situated for bringing suits against indenture trustees that he should be permitted to do so. In this event, Congress might also determine that the trustee's action was exclusive, or that it should be brought as a class action on behalf of all debenture holders, or perhaps even that the debenture holders should have the option of suing on their own or having the trustee sue on their behalf. Any number of alternatives are available. Congress would also be able to answer questions regarding subrogation or timing of law suits before these ques-

tions arise in the context of litigation. Whatever the decision, it is one that only Congress can make.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN concur, dissenting.

With all respect, today's decision reflects a misunderstanding of the important role which a reorganization trustee under Chapter X of the Bankruptcy Act, 11 U. S. C. § 567, is supposed to perform. Though prior to Chapter X the debtor had usually remained in possession, Chapter X effected a basic change by putting a disinterested trustee in charge. H. R. Rep. No. 1409, 75th Cong., 1st Sess., 43–44. Working under the direction of the Court, the reorganization trustee was to make the necessary investigations concerning the debtor, the operation of its business, and the desirability of its continuance "and any other matter relevant to the proceeding or *to the formulation of a plan,* and report thereon to the judge." 11 U. S. C. § 567 (emphasis added). The reorganization trustee is, indeed, charged by 11 U. S. C. § 569 with the responsibility of formulating a plan.[1]

A Chapter X plan does not look forward to a discharge of the debtor as does ordinary bankruptcy, but rather to an overhaul of its capital structure, a simplification of it, if need be, and the determination of the

[1] 11 U. S. C. § 569 provides:

"Where a trustee has been appointed the judge shall fix a time within which the trustee shall prepare and file a plan, or a report of his reasons why a plan cannot be effected, and shall fix a subsequent time for a hearing on such plan or report and for the consideration of any objections which may be made or of such amendments or plans as may be proposed by the debtor or by any creditor or stockholder."

fair share which each class of old creditors shall receive and what participation, if any, the old stockholders may be granted. The test which the court must ultimately apply under Chapter X is whether a plan is "fair and equitable, and feasible." 11 U. S. C. § 574. The test of "fair and equitable" derives from the old equity receiverships and was adopted in former § 77B of the Bankruptcy Act and under Chapter X.[2] As stated in the

[2] The "fixed principle" that senior interests must be made whole before junior interests may participate in a reorganization has its roots in *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482. In that case Boyd was a general and unpaid creditor of the old corporation. In a reorganization Boyd was not fully compensated although the old stockholders were allowed to participate in the new company. He proceeded against the assets of the new venture on the ground that since the old stockholders continued in the business the latter had received property which belonged to the creditors. This Court ruled for Boyd and said "if purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company." *Id.,* at 504. This principle came to be known as the "absolute priority rule." See Bonbright & Bergerman, Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganization, 28 Col. L. Rev. 127 (1928). The rule was incorporated into equity receiverships. *Kansas City Southern R. Co.* v. *Guardian Trust Co.,* 240 U. S. 166; *Kansas City Terminal R. Co.* v. *Central Union Trust Co.,* 271 U. S. 445. Later, in *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, 116, we held that the absolute-priority rule was part of the gloss which the case law had placed upon the phrase "fair and equitable," language which had been used in § 77B (f)(1) of the newly enacted § 77B bankruptcy reorganization statute. 48 Stat. 919. We concluded that Congress had intended that the *Boyd* rule be carried forward. *Consolidated Rock Co.* v. *Du Bois,* 312 U. S. 510, 527, reaffirmed this holding and further held that the requirement of absolute priority extended to cases where the debtor was solvent as well as those where the debtor was insolvent. Later, we made clear that the *Boyd* requirement obtained under Chapter X. *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.,* 317 U. S. 78, 85–87. As recent cases reflect, the absolute-priority doc-

House Report "the [reorganization] trustee is required to assemble the salient facts necessary for a determination of the fairness and equity of a plan of reorganization." H. R. Rep. No. 1409, 75th Cong., 1st Sess., 43.

The requirements of "fair and equitable," which the court must apply, entail the application of the absolute priority rule which we discussed at length in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, and which was followed in *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510. It not only gives creditors full priority over stockholders, but protects senior classes of creditors against the claim that "junior interests were improperly permitted to participate in a plan or were too liberally treated therein." 308 U. S., at 118. Unsecured creditors need not be paid in cash as a condition of stockholders retaining an interest in the reorganized company, for they may be protected by the issuance " 'on equitable terms, of income bonds or preferred stock.' " *Id.*, at 117.

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trine has been continued and is firmly entrenched in Chapter X law. *E. g., Protective Committee* v. *Anderson*, 390 U. S. 414, 441; *United States* v. *Key*, 397 U. S. 322, 327 (see also concurring opinion, at 333). The reach of that doctrine, however, has not been restricted to Chapter X proceedings but has also been applied to railroad reorganizations under § 77 of the Bankruptcy Act, *Ecker* v. *Western Pacific R. Co.*, 318 U. S. 448, 484; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 535, 571; *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495; to dissolutions under the Public Utility Holding Company Act of 1935, 49 Stat. 838, *Otis & Co.* v. *SEC*, 323 U. S. 624, 634 (but see dissenting opinion concluding that the rule had not been faithfully followed, at 648–649); *SEC* v. *Central-Illinois Corp.*, 338 U. S. 96, 130; to Chapter IX bankruptcy proceedings, *Kelley* v. *Everglades District*, 319 U. S. 415, 420–421, n. 1; and to affirm a dismissal of a Chapter XI petition on the ground that a Chapter X reorganization would provide more protection for creditors than a Chapter XI arrangement, *SEC* v. *U. S. Realty Co.*, 310 U. S. 434, 452, 456–458. And see *General Stores Corp.* v. *Shlensky*, 350 U. S. 462, 466.

And, as we said in the *Du Bois* case:

> "If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. So long as they receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis, the requirements of 'fair and equitable' are satisfied." 312 U. S., at 530.

The face amount of the debentures in litigation here was $4,298,200. The damages sought against the indenture trustee are in the same amount. If we assume, *arguendo,* that there is merit in the cause of action and that the indenture trustee is fully responsible, one entire class of security holders is eliminated from any necessary consideration in the plan. Or if there is only partial recovery, there is a pro rata change in the relative positions of the various classes of creditors. A plan cannot be designed without a final determination of the status of the debenture holders *vis-à-vis* the indenture trustee, or at least an informed judgment concerning the value of that claim.

It is said that the assets of the debtor were some $21 million and the liabilities some $60 million. Whether conditions have changed so as to leave some equity for the old stockholders, we do not know. The rule announced by the Court today, however, is not for this case alone but is applicable to all reorganizations under Chapter X. In some cases the elimination of one entire class of creditors or a pro rata reduction in their claims would give stockholders a chance to participate in the plan. There is no opportunity to make that determination without investigation, without a pursuit of claims, and without their prosecution or settlement. The reorganization trustee has full authority to do just that under the direction of the court. And unless he can take those

steps, he will not be able to formulate a plan of reorganization for submission to the court.

Of course, debenture holders or a protective committee representing them may in some cases take the lead. But Chapter X was written with the view that such matters should not be left to happenstance. That is why the reorganization trustee was made the "focal point" for taking an inventory of assets available to the several claimants and providing what plan would be fair and equitable in light of the security of some claimants or the payment of claims rightfully due them.[3]

There is, with all respect, no merit in the argument that, if the reorganization trustee recovers against the indenture trustee on behalf of the debenture holders, the indenture trustee will be subrogated to the debenture holders, leaving the total claims affected by the plan wholly unchanged.

The complaint against the indenture trustee charges willful misconduct or gross negligence. What the merits may be we, of course, do not know and intimate no opinion. But, if true, the Trust Indenture Act of 1939, 15 U. S. C. § 77*ooo*, gives no immunity.[4]

We said in *Pepper* v. *Litton*, 308 U. S. 295, 307, that "the bankruptcy court in passing on allowance of claims sits as a court of equity" and we cited the cases showing that claimants in a fiduciary position may have their claims either wholly disallowed or subordinated. *Id.*, at 311, 312. As stated in *American Surety Co.* v. *Bethle-*

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[3] See Hearings on H. R. 8406 before a Subcommittee of the Senate Committee on the Judiciary, 75th Cong., 2d Sess., 126.

[4] While the indenture trustee may rely on certificates or opinions concerning the truth of statements and the correctness of opinions "in the absence of bad faith" (15 U. S. C. § 77*ooo* (a)(1)), it is not exempt from liability "for its own negligent action, its own negligent failure to act, or its own willful misconduct" (15 U. S. C. § 77*ooo* (d)), save for errors in judgment made in good faith. *Ibid.*

hem Bank, 314 U. S. 314, 317, while the surety is "a special kind of secured creditor" it has a right that "can be availed of only by a surety alert in discharging its duty . . . and one not guilty of inequitable conduct." The indenture trustee is not, of course, a surety. It would have to seek subrogation under the general equitable doctrine, stated as follows by the American Law Institute: [5]

> "Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder."

It is not imaginable that any court would ever hold that an indenture trustee, found culpably responsible for the default on debentures, would be subrogated with respect to funds which otherwise would go to innocent creditors or stockholders on the ground that paying money to them rather than to it would constitute unjust enrichment. A person "who invokes the doctrine of subrogation must come into court with clean hands." *German Bank* v. *United States*, 148 U. S. 573, 581.

I agree with Judge Kaufman and Judge Hays, dissenting below, and would reverse this judgment.

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[5] Restatement of Restitution § 162 (1937).

Syllabus

KASTIGAR ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–117. Argued January 11, 1972—Decided May 22, 1972

The United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 U. S. C. § 6002, from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings, as such immunity from use and derivative use is coextensive with the scope of the privilege and is sufficient to compel testimony over a claim of the privilege. Transactional immunity would afford broader protection than the Fifth Amendment privilege, and is not constitutionally required. In a subsequent criminal prosecution, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of the compelled testimony. Pp. 443–462.

440 F. 2d 954, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., *post*, p. 462, and MARSHALL, J., *post*, p. 467, filed dissenting opinions. BRENNAN and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Hugh R. Manes argued the cause and filed briefs for petitioners.

Solicitor General Griswold argued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson, Assistant Attorney General Rehnquist, Jerome M. Feit,* and *Sidney M. Glazer.*

Briefs of *amici curiae* urging reversal were filed by *Melvin L. Wulf, Fred Okrand, A. L. Wirin,* and *Laurence R. Sperber* for the American Civil Liberties Union et al.; by *Benjamin Dreyfus* for the National Lawyers Guild; and by *Morton Stavis* and *Arthur Kinoy* for the Center for Constitutional Rights.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.

Petitioners were subpoenaed to appear before a United States grand jury in the Central District of California on February 4, 1971. The Government believed that petitioners were likely to assert their Fifth Amendment privilege. Prior to the scheduled appearances, the Government applied to the District Court for an order directing petitioners to answer questions and produce evidence before the grand jury under a grant of immunity conferred pursuant to 18 U. S. C. §§ 6002–6003. Petitioners opposed issuance of the order, contending primarily that the scope of the immunity provided by the statute was not coextensive with the scope of the privilege against self-incrimination, and therefore was not sufficient to supplant the privilege and compel their testimony. The District Court rejected this contention, and ordered petitioners to appear before the grand jury and answer its questions under the grant of immunity.

Petitioners appeared but refused to answer questions, asserting their privilege against compulsory self-incrimination. They were brought before the District Court, and each persisted in his refusal to answer the grand jury's questions, notwithstanding the grant of immunity. The court found both in contempt, and committed them to the custody of the Attorney General until either they answered the grand jury's questions or the term of the grand jury expired.[1] The Court of

[1] The contempt order was issued pursuant to 28 U. S. C. § 1826.

Appeals for the Ninth Circuit affirmed. *Stewart* v. *United States,* 440 F. 2d 954 (CA9 1971). This Court granted certiorari to resolve the important question whether testimony may be compelled by granting immunity from the use of compelled testimony and evidence derived therefrom ("use and derivative use" immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ("transactional" immunity). 402 U. S. 971 (1971).

I

The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence.[2] The power with respect to courts was established by statute in England as early as 1562,[3] and Lord Bacon observed in 1612 that all subjects owed the King their "knowledge and discovery."[4] While it is not clear when grand juries first resorted to compulsory process to secure the attendance and testimony of witnesses, the general common-law principle that "the public has a right to every man's evidence" was considered an "indubitable certainty" that "cannot be denied" by 1742.[5] The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amend-

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[2] For a concise history of testimonial compulsion prior to the adoption of our Constitution, see 8 J. Wigmore, Evidence § 2190 (J. McNaughton rev. 1961). See *Ullmann* v. *United States,* 350 U. S. 422, 439 n. 15 (1956); *Blair* v. *United States,* 250 U. S. 273 (1919).

[3] Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562).

[4] *Countess of Shrewsbury's Case,* 2 How. St. Tr. 769, 778 (1612).

[5] See the parliamentary debate on the Bill to Indemnify Evidence, particularly the remarks of the Duke of Argyle and Lord Chancellor Hardwicke, reported in 12 T. Hansard, Parliamentary History of England 675, 693 (1812). See also *Piemonte* v. *United States,* 367 U. S. 556, 559 n. 2 (1961); *Ullmann* v. *United States, supra,* at 439 n. 15; *Brown* v. *Walker,* 161 U. S. 591, 600 (1896).

ment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor. The first Congress recognized the testimonial duty in the Judiciary Act of 1789, which provided for compulsory attendance of witnesses in the federal courts.[6] MR. JUSTICE WHITE noted the importance of this essential power of government in his concurring opinion in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 93–94 (1964):

> "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. See *Blair* v. *United States*, 250 U. S. 273. Such testimony constitutes one of the Government's primary sources of information."

But the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty,[7] the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations,[8] and marks an important advance in the development of our liberty.[9] It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory;[10] and it

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[6] 1 Stat. 73, 88–89.

[7] See *Blair* v. *United States*, *supra*, at 281; 8 Wigmore, *supra*, n. 2, §§ 2192, 2197.

[8] See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55 (1964).

[9] See *Ullmann* v. *United States*, 350 U. S., at 426; E. Griswold, The Fifth Amendment Today 7 (1955).

[10] *Murphy* v. *Waterfront Comm'n*, *supra*, at 94 (WHITE, J., concurring); *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924); *United States* v. *Saline Bank*, 1 Pet. 100 (1828); cf. *Gardner* v. *Broderick*, 392 U. S. 273 (1968).

protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.[11] This Court has been zealous to safeguard the values that underlie the privilege.[12]

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence,[13] are not incompatible

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[11] *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Blau* v. *United States*, 340 U. S. 159 (1950); *Mason* v. *United States*, 244 U. S. 362, 365 (1917).

[12] See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436, 443–444 (1966); *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

[13] Soon after the privilege against compulsory self-incrimination became firmly established in law, it was recognized that the privilege did not apply when immunity, or "indemnity," in the English usage, had been granted. See L. Levy, Origins of the Fifth Amendment 328, 495 (1968). Parliament enacted an immunity statute in 1710 directed against illegal gambling, 9 Anne, c. 14, §§ 3–4, which became the model for an identical immunity statute enacted in 1774 by the Colonial Legislature of New York. Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of New York 621, 623 (1894). These statutes provided that the loser could sue the winner, who was compelled to answer the loser's charges. After the winner responded and returned his ill-gotten gains, he was "acquitted, indemnified [immunized] and discharged from any further or other Punishment, Forfeiture or Penalty, which he . . . may have incurred by the playing for, and winning such Money . . . ." 9 Anne, c. 14, § 4 (1710); Law of Mar. 9, 1774, c. 1651, 5 Colonial Laws of New York, at 623.

Another notable instance of the early use of immunity legislation is the 1725 impeachment trial of Lord Chancellor Macclesfield. The Lord Chancellor was accused by the House of Commons of the sale of public offices and appointments. In order to compel the testimony of Masters in Chancery who had allegedly purchased their offices from the Lord Chancellor, and who could incriminate themselves by so testifying, Parliament enacted a statute granting immunity to persons then holding office as Masters in Chancery. *Lord Chancellor Macclesfield's Trial*, 16 How. St. Tr. 767, 1147 (1725). See 8 Wigmore, *supra*, n. 2, § 2281, at 492. See also *Bishop Atterbury's Trial*, 16 How. St. Tr. 323, 604–605 (1723). The legislatures

with these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. Indeed, their origins were in the context of such offenses,[14]

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in colonial Pennsylvania and New York enacted immunity legislation in the 18th century. See, *e. g.*, Resolution of Jan. 6, 1758, in Votes and Proceedings of the House of Representatives of the Province of Pennsylvania (1682–1776), 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of Mar. 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 353–354; Law of Mar. 9, 1774, c. 1651, *id.*, at 621, 623; Law of Mar. 9, 1774, c. 1655, *id.*, at 639, 641–642. See generally L. Levy, Origins of the Fifth Amendment 359, 384–385, 389, 402–403 (1968). Federal immunity statutes have existed since 1857. Act of Jan. 24, 1857, 11 Stat. 155. For a history of the various federal immunity statutes, see Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568 (1963); Wendel, Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion, 10 St. Louis U. L. Rev. 327 (1966); and National Commission on Reform of Federal Criminal Laws, Working Papers, 1406–1411 (1970).

[14] See, *e. g.*, Resolution of Jan. 6, 1758, n. 13, *supra*, 6 Pennsylvania Archives (8th series) 4679 (C. Hoban ed. 1935); Law of Mar. 24, 1772, c. 1542, 5 Colonial Laws of New York 351, 354; Law of Mar. 9, 1774, c. 1655, *id.*, at 639, 642. *Bishop Atterbury's Trial, supra*, for which the House of Commons passed immunity legislation, was a prosecution for treasonable conspiracy. See *id.*, at 604–605; 8 Wigmore, *supra*, n. 2, § 2281, at 492 n. 2. *Lord Chancellor Macclesfield's Trial, supra*, for which Parliament passed immunity legislation, was a prosecution for political bribery involving the sale of public offices and appointments. See *id.*, at 1147. The first federal immunity statute was enacted to facilitate an investigation of charges of corruption and vote buying in the House of Representatives. See Comment, n. 13, *supra*, 72 Yale L. J., at 1571.

and their primary use has been to investigate such offenses.[15] Congress included immunity statutes in many of the regulatory measures adopted in the first half of this century.[16] Indeed, prior to the enactment of the statute under consideration in this case, there were in force over 50 federal immunity statutes.[17] In addition, every State in the Union, as well as the District of Columbia and Puerto Rico, has one or more such statutes.[18] The commentators,[19] and this Court on several occasions,[20] have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, speaking for the Court in *Ullmann* v. *United States*, 350 U. S. 422 (1956), such statutes have "become part of our constitutional fabric." [21] *Id.*, at 438.

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[15] See 8 Wigmore, *supra*, n. 2, § 2281, at 492. MR. JUSTICE WHITE noted in his concurring opinion in *Murphy* v. *Waterfront Comm'n*, 378 U. S., at 92, that immunity statutes "have for more than a century been resorted to for the investigation of many offenses, chiefly those whose proof and punishment were otherwise impracticable, such as political bribery, extortion, gambling, consumer frauds, liquor violations, commercial larceny, and various forms of racketeering." *Id.*, at 94–95. See n. 14, *supra*.

[16] See Comment, n. 13, *supra*, 72 Yale L. J., at 1576.

[17] For a listing of these statutes, see National Commission on Reform of Federal Criminal Laws, Working Papers, 1444–1445 (1970).

[18] For a listing of these statutes, see 8 Wigmore, *supra*, n. 2, § 2281, at 495 n. 11.

[19] See, *e. g.*, 8 J. Wigmore, Evidence § 2281, at 501 (3d ed. 1940); 8 Wigmore, *supra*, n. 2, § 2281, at 496.

[20] See *Hale* v. *Henkel*, 201 U. S. 43, 70 (1906); *Brown* v. *Walker*, 161 U. S., at 610.

[21] This statement was made with specific reference to the Compulsory Testimony Act of 1893, 27 Stat. 443, the model for almost all federal immunity statutes prior to the enactment of the statute under consideration in this case. See *Murphy* v. *Waterfront Comm'n*, 378 U. S., at 95 (WHITE, J., concurring).

II

Petitioners contend, first, that the Fifth Amendment's privilege against compulsory self-incrimination, which is that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," deprives Congress of power to enact laws that compel self-incrimination, even if complete immunity from prosecution is granted prior to the compulsion of the incriminatory testimony. In other words, petitioners assert that no immunity statute, however drawn, can afford a lawful basis for compelling incriminatory testimony. They ask us to reconsider and overrule *Brown* v. *Walker*, 161 U. S. 591 (1896), and *Ullmann* v. *United States*, *supra*, decisions that uphold the constitutionality of immunity statutes.[22] We find no merit to this contention and reaffirm the decisions in *Brown* and *Ullmann*.

III

Petitioners' second contention is that the scope of immunity provided by the federal witness immunity statute, 18 U. S. C. § 6002, is not coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination, and therefore is not sufficient to supplant the privilege and compel testimony over a claim of the privilege. The statute provides that when a witness is compelled by district court order to testify over a claim of the privilege:

> "the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information

[22] Accord, *Gardner* v. *Broderick*, 392 U. S., at 276; *Murphy* v. *Waterfront Comm'n*, *supra*; *McCarthy* v. *Arndstein*, 266 U. S., at 42 (Brandeis, J.); *Heike* v. *United States*, 227 U. S. 131, 142 (1913) (Holmes, J.).

> directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." [23] 18 U. S. C. § 6002.

The constitutional inquiry, rooted in logic and history, as well as in the decisions of this Court, is whether the immunity granted under this statute is coextensive with the scope of the privilege.[24] If so, petitioners' refusals to answer based on the privilege were unjustified, and the judgments of contempt were proper, for the grant of immunity has removed the dangers against which the privilege protects. *Brown* v. *Walker, supra.* If, on the other hand, the immunity granted is not as comprehensive as the protection afforded by the privilege, petitioners were justified in refusing to answer, and the judgments of contempt must be vacated. *McCarthy* v. *Arndstein,* 266 U. S. 34, 42 (1924).

Petitioners draw a distinction between statutes that provide transactional immunity and those that provide, as does the statute before us, immunity from use and derivative use.[25] They contend that a statute must at a minimum grant full transactional immunity in order to be coextensive with the scope of the privilege. In support of this contention, they rely on *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892), the first case in which this Court considered a constitutional challenge to an immunity statute. The statute, a re-enactment of the Immunity Act of 1868,[26] provided that no "evidence obtained from a party or witness by means of a judicial

[23] For other provisions of the 1970 Act relative to immunity of witnesses, see 18 U. S. C. §§ 6001–6005.

[24] See, *e. g., Murphy* v. *Waterfront Comm'n, supra,* at 54, 78; *Counselman* v. *Hitchcock,* 142 U. S. 547, 585 (1892).

[25] See *Piccirillo* v. *New York,* 400 U. S. 548 (1971).

[26] 15 Stat. 37.

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proceeding . . . shall be given in evidence, or in any manner used against him . . . in any court of the United States . . . ." [27] Notwithstanding a grant of immunity and order to testify under the revised 1868 Act, the witness, asserting his privilege against compulsory self-incrimination, refused to testify before a federal grand jury. He was consequently adjudged in contempt of court.[28] On appeal, this Court construed the statute as affording a witness protection only against the use of the specific testimony compelled from him under the grant of immunity. This construction meant that the statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him." [29] Since the revised 1868 Act, as construed by the Court, would permit the use against the immunized witness of evidence derived from his compelled testimony, it did not protect the witness to the same extent that a claim of the privilege would protect him. Accordingly, under the principle that a grant of immunity cannot supplant the privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege,[30] the witness' refusal to testify was held proper. In the course of its opinion, the Court made the following statement, on which petitioners heavily rely:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution

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[27] See *Counselman* v. *Hitchcock, supra,* at 560.

[28] *In re Counselman,* 44 F. 268 (CCND Ill. 1890).

[29] *Counselman* v. *Hitchcock, supra,* at 564.

[30] Precisely, the Court held "that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply [*sic*] one, at least unless it is so broad as to have the same extent in scope and effect." *Id.,* at 585. See *Murphy* v. *Waterfront Comm'n, supra,* at 54, 78.

> after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. [The immunity statute under consideration] does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." 142 U. S., at 585–586.

Sixteen days after the *Counselman* decision, a new immunity bill was introduced by Senator Cullom,[31] who urged that enforcement of the Interstate Commerce Act would be impossible in the absence of an effective immunity statute.[32] The bill, which became the Compulsory Testimony Act of 1893,[33] was drafted specifically to meet the broad language in *Counselman* set forth above.[34] The new Act removed the privilege against self-incrimination in hearings before the Interstate Commerce Commission and provided that:

> "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . . ." Act of Feb. 11, 1893, 27 Stat. 444.

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[31] *Counselman* was decided Jan. 11, 1892. Senator Cullom introduced the new bill on Jan. 27, 1892. 23 Cong. Rec. 573.

[32] 23 Cong. Rec. 6333.

[33] Act of Feb. 11, 1893, 27 Stat. 443, repealed by the Organized Crime Control Act of 1970, Pub. L. No. 91–452, § 245, 84 Stat. 931.

[34] See the remarks of Senator Cullom, 23 Cong. Rec. 573, 6333, and Congressman Wise, who introduced the bill in the House. 24 Cong. Rec. 503. See *Shapiro* v. *United States*, 335 U. S. 1, 28–29 and n. 36 (1948).

This transactional immunity statute became the basic form for the numerous federal immunity statutes [35] until 1970, when, after re-examining applicable constitutional principles and the adequacy of existing law, Congress enacted the statute here under consideration.[36] The new statute, which does not "afford [the] absolute immunity against future prosecution" referred to in *Counselman*, was drafted to meet what Congress judged to be the conceptual basis of *Counselman*, as elaborated in subsequent decisions of the Court, namely, that immunity from the

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[35] *Ullmann* v. *United States*, 350 U. S., at 438; *Shapiro* v. *United States*, *supra*, at 6. There was one minor exception. See *Piccirillo* v. *New York*, 400 U. S., at 571 and n. 11 (BRENNAN, J., dissenting); *Arndstein* v. *McCarthy*, 254 U. S. 71, 73 (1920).

[36] The statute is a product of careful study and consideration by the National Commission on Reform of Federal Criminal Laws, as well as by Congress. The Commission recommended legislation to reform the federal immunity laws. The recommendation served as the model for this statute. In commenting on its proposal in a special report to the President, the Commission said:

"We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of the individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing. The proposed immunity is thus of the same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers." Second Interim Report of the National Commission on Reform of Federal Criminal Laws, Mar. 17, 1969, Working Papers of the Commission, 1446 (1970).

The Commission's recommendation was based in large part on a comprehensive study of immunity and the relevant decisions of this Court prepared for the Commission by Prof. Robert G. Dixon, Jr., of the George Washington University Law Center, and transmitted to the President with the recommendations of the Commission. See National Commission on Reform of Federal Criminal Laws, Working Papers, 1405–1444 (1970).

use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege.[37]

The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" [38] Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Our holding is consistent with the conceptual basis of *Counselman*. The *Counselman* statute, as construed by the Court, was plainly deficient in its failure to

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[37] See S. Rep. No. 91–617, pp. 51–56, 145 (1969); H. R. Rep. No. 91–1549, p. 42 (1970).

[38] *Ullmann* v. *United States*, 350 U. S., at 438–439, quoting *Boyd* v. *United States*, 116 U. S., at 634. See *Knapp* v. *Schweitzer*, 357 U. S. 371, 380 (1958).

prohibit the use against the immunized witness of evidence derived from his compelled testimony. The Court repeatedly emphasized this deficiency, noting that the statute:

> "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding . . ." 142 U. S., at 564;

that it:

> "could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted," *ibid.;*

and that it:

> "affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party." 142 U. S., at 586.

The basis of the Court's decision was recognized in *Ullmann* v. *United States,* 350 U. S. 422 (1956), in which the Court reiterated that the *Counselman* statute was insufficient:

> "because the immunity granted was incomplete, in that it merely forbade the use of the testimony given and failed to protect a witness from future prosecution *based on knowledge and sources of information obtained from the compelled testimony." Id.,* at 437. (Emphasis supplied.)

See also *Arndstein* v. *McCarthy,* 254 U. S. 71, 73 (1920). The broad language in *Counselman* relied upon by peti-

tioners was unnecessary to the Court's decision, and cannot be considered binding authority.[39]

In *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964), the Court carefully considered immunity from use of compelled testimony and evidence derived therefrom. The *Murphy* petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor. After refusing to answer certain questions on the ground that the answers might tend to incriminate them, petitioners were granted im-

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[39] Cf. The Supreme Court, 1963 Term, 78 Harv. L. Rev. 179, 230 (1964). Language similar to the *Counselman* dictum can be found in *Brown* v. *Walker*, 161 U. S., at 594–595, and *Hale* v. *Henkel*, 201 U. S., at 67. *Brown* and *Hale*, however, involved statutes that were clearly sufficient to supplant the privilege against self-incrimination, as they provided full immunity from prosecution "for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence . . . ." 161 U. S., at 594; 201 U. S., at 66. The same is true of *Smith* v. *United States*, 337 U. S. 137, 141, 146 (1949), and *United States* v. *Monia*, 317 U. S. 424, 425, 428 (1943). In *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965), some of the *Counselman* language urged upon us by petitioners was again quoted. But *Albertson*, like *Counselman*, involved an immunity statute that was held insufficient for failure to prohibit the use of evidence derived from compelled admissions and the use of compelled admissions as an "investigatory lead." *Id.*, at 80.

In *Adams* v. *Maryland*, 347 U. S. 179, 182 (1954), and in *United States* v. *Murdock*, 284 U. S. 141, 149 (1931), the *Counselman* dictum was referred to as the principle of *Counselman*. The references were in the context of ancillary points not essential to the decisions of the Court. The *Adams* Court did note, however, that the Fifth Amendment privilege prohibits the "use" of compelled self-incriminatory testimony. 347 U. S., at 181. In any event, the Court in *Ullmann* v. *United States*, 350 U. S., at 436–437, recognized that the rationale of *Counselman* was that the *Counselman* statute was insufficient for failure to prohibit the use of evidence derived from compelled testimony. See also *Arndstein* v. *McCarthy*, 254 U. S., at 73.

munity from prosecution under the laws of New Jersey and New York.[40] They continued to refuse to testify, however, on the ground that their answers might tend to incriminate them under federal law, to which the immunity did not purport to extend. They were adjudged in civil contempt, and that judgment was affirmed by the New Jersey Supreme Court.[41]

The issue before the Court in *Murphy* was whether New Jersey and New York could compel the witnesses, whom these States had immunized from prosecution under their laws, to give testimony that might then be used to convict them of a federal crime. Since New Jersey and New York had not purported to confer immunity from federal prosecution, the Court was faced with the question what limitations the Fifth Amendment privilege imposed on the prosecutorial powers of the Federal Government, a nonimmunizing sovereign. After undertaking an examination of the policies and purposes of the privilege, the Court overturned the rule that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction.[42] The Court held that the privilege protects state witnesses against incrimination under federal as well as state law, and federal witnesses against incrim-

[40] The Waterfront Commission of New York Harbor is a bistate body established under an interstate compact approved by Congress. 67 Stat. 541.

[41] *In re Waterfront Comm'n of N. Y. Harbor,* 39 N. J. 436, 189 A. 2d 36 (1963).

[42] Reconsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony that could be used to convict him in another jurisdiction was made necessary by the decision in *Malloy* v. *Hogan,* 378 U. S. 1 (1964), in which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment. *Murphy* v. *Waterfront Comm'n,* 378 U. S., at 57.

ination under state as well as federal law. Applying this principle to the state immunity legislation before it, the Court held the constitutional rule to be that:

> "[A] state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." [43] 378 U. S., at 79.

The Court emphasized that this rule left the state witness and the Federal Government, against which the witness had immunity only from the *use* of the compelled testimony and evidence derived therefrom, "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." *Ibid.*

It is true that in *Murphy* the Court was not presented with the precise question presented by this case, whether a jurisdiction seeking to compel testimony may do so by granting only use and derivative-use immunity, for New Jersey and New York had granted petitioners transactional immunity. The Court heretofore has not

[43] At this point the Court added the following note: "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.*, at 79 n. 18. If transactional immunity had been deemed to be the "constitutional rule" there could be no federal prosecution.

squarely confronted this question,[44] because post-*Counselman* immunity statutes reaching the Court either have followed the pattern of the 1893 Act in providing transactional immunity,[45] or have been found deficient for failure to prohibit the use of all evidence derived from compelled testimony.[46] But both the reasoning of the Court in *Murphy* and the result reached compel the conclusion that use and derivative-use immunity is constitutionally sufficient to compel testimony over a claim of the privilege. Since the privilege is fully applicable and its scope is the same whether invoked in a state or in a federal jurisdiction,[47] the *Murphy* conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege. As the *Murphy* Court noted, immunity from use and derivative use "leaves the witness and the Federal Government in substantially the same position

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[44] See, *e. g.*, *California* v. *Byers*, 402 U. S. 424, 442 n. 3 (1971) (Harlan, J., concurring in judgment); *United States* v. *Freed*, 401 U. S. 601, 606 n. 11 (1971); *Piccirillo* v. *New York*, 400 U. S. 548 (1971); *Stevens* v. *Marks*, 383 U. S. 234, 244–245 (1966).

[45] *E. g.*, *Murphy* v. *Waterfront Comm'n*, *supra*; *Ullmann* v. *United States*, *supra*; *Smith* v. *United States*, 337 U. S. 137 (1949); *United States* v. *Monia*, 317 U. S. 424 (1943); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Jack* v. *Kansas*, 199 U. S. 372 (1905); *Brown* v. *Walker*, 161 U. S. 591 (1896). See also n. 35, *supra*.

[46] *E. g.*, *Albertson* v. *Subversive Activities Control Board*, 382 U. S., at 80; *Arndstein* v. *McCarthy*, 254 U. S., at 73.

[47] In *Malloy* v. *Hogan*, 378 U. S., at 10–11, the Court held that the same standards would determine the extent or scope of the privilege in state and in federal proceedings, because the same substantive guarantee of the Bill of Rights is involved. The *Murphy* Court emphasized that the scope of the privilege is the same in state and in federal proceedings. *Murphy* v. *Waterfront Comm'n*, 378 U. S., at 79.

as if the witness had claimed his privilege" [48] in the absence of a grant of immunity. The *Murphy* Court was concerned solely with the danger of incrimination under federal law, and held that immunity from use and derivative use was sufficient to displace the danger. This protection coextensive with the privilege is the degree of protection that the Constitution requires, and is all that the Constitution requires even against the jurisdiction compelling testimony by granting immunity.[49]

IV

Although an analysis of prior decisions and the purpose of the Fifth Amendment privilege indicates that use and derivative-use immunity is coextensive with the privilege, we must consider additional arguments advanced by petitioners against the sufficiency of such immunity. We start from the premise, repeatedly affirmed by this Court, that an appropriately broad immunity grant is compatible with the Constitution.

Petitioners argue that use and derivative-use immunity will not adequately protect a witness from various possible incriminating uses of the compelled testimony: for example, the prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution. It will be difficult and perhaps impossible, the argument goes, to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness, especially in the jurisdiction granting the immunity.

This argument presupposes that the statute's pro-

[48] *Ibid.*

[49] As the Court noted in *Gardner* v. *Broderick*, 392 U. S., at 276, "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying."

hibition will prove impossible to enforce. The statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom:

> "[N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case . . . ." 18 U. S. C. § 6002.

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an "investigatory lead," [50] and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

A person accorded this immunity under 18 U. S. C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy:*

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U. S., at 79 n. 18.

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

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[50] See, *e. g., Albertson* v. *Subversive Activities Control Board,* 382 U. S., at 80.

This is very substantial protection,[51] commensurate with that resulting from invoking the privilege itself. The privilege assures that a citizen is not compelled to incriminate himself by his own testimony. It usually operates to allow a citizen to remain silent when asked a question requiring an incriminatory answer. This statute, which operates after a witness has given incriminatory testimony, affords the same protection by assuring that the compelled testimony can in no way lead to the infliction of criminal penalties. The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute and the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources.

The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions.[52] A coerced confession, as revealing of leads as testimony given in exchange for immunity,[53] is inadmissible in a criminal trial, but it does not bar prosecution.[54] Moreover, a defendant against whom incriminating evidence has been obtained through a grant of immunity may be in a stronger position at trial than a defendant who asserts a Fifth Amendment coerced-confession claim. One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from

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[51] See *Murphy* v. *Waterfront Comm'n*, 378 U. S., at 102–104 (WHITE, J., concurring).

[52] *Adams* v. *Maryland*, 347 U. S., at 181; *Bram* v. *United States*, 168 U. S. 532, 542 (1897).

[53] As MR. JUSTICE WHITE, concurring in *Murphy*, pointed out:

"A coerced confession is as revealing of leads as testimony given in exchange for immunity and indeed is excluded in part because it is compelled incrimination in violation of the privilege. *Malloy* v. *Hogan*, [378 U. S. 1, 7–8]; *Spano* v. *New York*, 360 U. S. 315; *Bram* v. *United States*, 168 U. S. 532." 378 U. S., at 103.

[54] *Jackson* v. *Denno*, 378 U. S. 368 (1964).

legitimate independent sources.[55] On the other hand, a defendant raising a coerced-confession claim under the Fifth Amendment must first prevail in a voluntariness hearing before his confession and evidence derived from it become inadmissible.[56]

There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant where, acting pursuant to statute and accompanying safeguards, testimony is compelled in exchange for immunity from use and derivative use when no such amnesty is required where the government, acting without colorable right, coerces a defendant into incriminating himself.

We conclude that the immunity provided by 18 U. S. C. § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it. The judgment of the Court of Appeals for the Ninth Circuit accordingly is

Affirmed.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

The Self-Incrimination Clause says: "No person . . . shall be compelled in any criminal case to be a witness against himself." I see no answer to the proposition that he is such a witness when only "use" immunity is granted.

My views on the question of the scope of immunity that is necessary to force a witness to give up his guar-

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[55] See *supra*, at 460; Brief for the United States 37; Cf. *Chapman* v. *California*, 386 U. S. 18 (1967).

[56] *Jackson* v. *Denno*, *supra*.

antee against self-incrimination contained in the Fifth Amendment are so well known, see *Ullmann* v. *United States,* 350 U. S. 422, 440 (dissenting), and *Piccirillo* v. *New York,* 400 U. S. 548, 549 (dissenting), that I need not write at length.

In *Counselman* v. *Hitchcock,* 142 U. S. 547, 586, the Court adopted the transactional immunity test: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." *Id.,* at 586. In *Brown* v. *Walker,* 161 U. S. 591, a case involving another federal prosecution, the immunity statute provided that the witness would be protected "on account of any transaction . . . concerning which he may testify." *Id.,* at 594. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to testify, a ruling that made "transactional immunity" part of the fabric of our constitutional law. *Ullmann* v. *United States, supra,* at 438.

This Court, however, apparently believes that *Counselman* and its progeny were overruled *sub silentio* in *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52. *Murphy* involved state witnesses, granted transactional immunity under state law, who refused to testify for fear of subsequent federal prosecution. We held that the testimony in question could be compelled, but that the Federal Government would be barred from using any of the testimony, or its fruits, in a subsequent federal prosecution.

Murphy overruled, not *Counselman,* but *Feldman* v. *United States,* 322 U. S. 487, which had held "that one jurisdiction within our federal structure may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction." *Murphy* v. *Waterfront Comm'n, supra,* at 77. But *Counselman,*

as the *Murphy* Court recognized, "said nothing about the problem of incrimination under the law of another sovereign." *Id.*, at 72. That problem is one of federalism, as to require transactional immunity between jurisdictions might

> "deprive a state of the right to prosecute a violation of its criminal law on the basis of another state's grant of immunity [a result which] would be gravely in derogation of its sovereignty and obstructive of its administration of justice." *United States ex rel. Catena* v. *Elias*, 449 F. 2d 40, 44 (CA3 1971).

Moreover, as MR. JUSTICE BRENNAN has pointed out, the threat of future prosecution

> "substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction that compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved." *Piccirillo* v. *New York*, 400 U. S., at 568 (dissenting).

None of these factors apply when the threat of prosecution is from the jurisdiction seeking to compel the testimony, which is the situation we faced in *Counselman*, and which we face today. The irrelevance of *Murphy* to such a situation was made clear in *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70, in which the Court struck down an immunity statute because it failed to measure up to the standards set forth in *Counselman*. Inasmuch as no interjurisdictional problems presented themselves, *Murphy* was not even cited. That is further proof that *Murphy* was not thought significantly to

undercut *Counselman.*[1] See *Stevens* v. *Marks,* 383 U. S. 234, 244–245; *id.,* at 249–250 (Harlan, J., concurring and dissenting); Mansfield, The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, 1966 Sup. Ct. Rev. 103, 164.

If, as some have thought, the Bill of Rights contained only "counsels of moderation" from which courts and legislatures could deviate according to their conscience or discretion, then today's contraction of the Self-Incrimination Clause of the Fifth Amendment would be understandable. But that has not been true, starting with Chief Justice Marshall's opinion in *United States* v. *Burr,*

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[1] In *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70, the Court was faced with a Fifth Amendment challenge to the Communist registration provision of the Subversive Activities Control Act of 1950, 64 Stat. 987. We held that the provision violated the prospective registrant's privilege against self-incrimination, and that the registration provision was not saved by a so-called "immunity statute" (§ 4 (f)) which prohibited the introduction into evidence in any criminal prosecution of the fact of registration under the Act. The Court's analysis of this immunity provision rested solely on *Counselman:*

"In *Counselman* v. *Hitchcock,* 142 U. S. 547, decided in 1892, the Court held 'that no [immunity] statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege . . . ,' and that such a statute is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was designed to guard . . .' by affording 'absolute immunity against future prosecution for the offence to which the question relates.' *Id.,* at 585–586. *Measured by these standards,* the immunity granted by § 4 (f) is not complete." 382 U. S., at 80. (Emphasis added.)

Thus, the *Albertson* Court, which could have struck the statute by employing the test approved today, went well beyond, and measured the statute solely against the more restrictive standards of *Counselman.*

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25 F. Cas. 38 (No. 14692e) (CC Va.), where he ruled that the reach of the Fifth Amendment was so broad as to make the privilege applicable when there was a mere possibility of a criminal charge being made.

The Court said in *Hale* v. *Henkel*, 201 U. S. 43, 67, that "if the criminality has already been taken away, the Amendment ceases to apply." In other words, the immunity granted is adequate if it operates as a complete pardon for the offense. *Brown* v. *Walker*, 161 U. S., at 595. That is the true measure of the Self-Incrimination Clause. As MR. JUSTICE BRENNAN has stated: "[U]se immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality." *Piccirillo* v. *New York*, *supra*, at 567 (dissenting).

As MR. JUSTICE BRENNAN has also said:

> "Transactional immunity . . . provides the individual with an assurance that he is not testifying about matters for which he may later be prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony." 400 U. S., at 568–569 (dissenting).

When we allow the prosecution to offer only "use" immunity we allow it to grant far less than it has taken away. For while the precise testimony that is compelled may not be used, leads from that testimony may

be pursued and used to convict the witness.[2] My view is that the framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The Self-Incrimination Clause creates, as I have said before, "the federally protected right of silence," making it unconstitutional to use a law "to pry open one's lips and make him a witness against himself." *Ullmann* v. *United States*, 350 U. S., at 446 (dissenting). That is indeed one of the chief procedural guarantees in our accusatorial system. Government acts in an ignoble way when it stoops to the end which we authorize today.

I would adhere to *Counselman* v. *Hitchcock* and hold that this attempt to dilute the Self-Incrimination Clause is unconstitutional.

MR. JUSTICE MARSHALL, dissenting.

Today the Court holds that the United States may compel a witness to give incriminating testimony, and subsequently prosecute him for crimes to which that testimony relates. I cannot believe the Fifth Amendment permits that result. See *Piccirillo* v. *New York*, 400 U. S. 548, 552 (1971) (BRENNAN, J., dissenting from dismissal of certiorari).

The Fifth Amendment gives a witness an absolute right to resist interrogation, if the testimony sought would tend to incriminate him. A grant of immunity

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[2] As MR. JUSTICE MARSHALL points out, *post*, at 469, it is futile to expect that a ban on use or derivative use of compelled testimony can be enforced.

It is also possible that use immunity might actually have an adverse impact on the administration of justice rather than promote law enforcement. A witness might believe, with good reason, that his "immunized" testimony will inevitably lead to a felony conviction. Under such circumstances, rather than testify and aid the investigation, the witness might decide he would be better off remaining silent even if he is jailed for contempt.

may strip the witness of the right to refuse to testify, but only if it is broad enough to eliminate all possibility that the testimony will in fact operate to incriminate him. It must put him in precisely the same position, *vis-à-vis* the government that has compelled his testimony,* as he would have been in had he remained silent in reliance on the privilege. *Ullmann* v. *United States*, 350 U. S. 422 (1956); *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Brown* v. *Walker*, 161 U. S. 591 (1896); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892).

The Court recognizes that an immunity statute must be tested by that standard, that the relevant inquiry is whether it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Ante*, at 462. I assume, moreover, that in theory that test would be met by a complete ban on the use of the compelled testimony, including all derivative use, however remote and indirect. But I cannot agree that a ban on use will in practice be total, if it remains open for the government to convict the witness on the basis of evidence derived from a legitimate independent source. The Court asserts that the witness is adequately protected by a rule imposing on the government a heavy burden of proof if it would establish the independent character of evidence to be used against the witness. But in light of the inevitable uncertainties of the fact-finding process, see *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958), a greater margin of protection is required in order to provide a reliable guarantee that the witness

*This case does not, of course, involve the special considerations that come into play when the prosecuting government is different from the government that has compelled the testimony. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964).

is in exactly the same position as if he had not testified. That margin can be provided only by immunity from prosecution for the offenses to which the testimony relates, *i. e.*, transactional immunity.

I do not see how it can suffice merely to put the burden of proof on the government. First, contrary to the Court's assertion, the Court's rule does leave the witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Ante*, at 460. For the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities. They alone are in a position to trace the chains of information and investigation that lead to the evidence to be used in a criminal prosecution. A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. Cf. *Giglio* v. *United States*, 405 U. S. 150 (1972); *Santobello* v. *New York*, 404 U. S. 257 (1971). The Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will in fact slip through that net.

In my view the Court turns reason on its head when it compares a statutory grant of immunity to the "immunity" that is inadvertently conferred by an unconstitutional interrogation. The exclusionary rule of evidence that applies in that situation has nothing whatever to do with this case. Evidence obtained through a coercive interrogation, like evidence obtained through an illegal search, is excluded at trial because the Constitution prohibits such methods of gathering evidence. The exclusionary rules provide a partial and inadequate remedy to some victims of illegal police conduct, and a similarly partial and inadequate deterrent to police officers. An immunity statute, on the other hand, is much more ambitious than any exclusionary rule. It does not merely attempt to provide a remedy for past police misconduct, which never should have occurred. An immunity statute operates in advance of the event, and it authorizes—even encourages—interrogation that would otherwise be prohibited by the Fifth Amendment. An immunity statute thus differs from an exclusionary rule of evidence in at least two critical respects.

First, because an immunity statute gives constitutional approval to the resulting interrogation, the government is under an obligation here to remove the danger of incrimination completely and absolutely, whereas in the case of the exclusionary rules it may be sufficient to shield the witness from the fruits of the illegal search or interrogation in a partial and reasonably adequate manner. For when illegal police conduct has occurred, the exclusion of evidence does not purport to purge the conduct of its unconstitutional character. The constitutional violation remains, and may provide the basis for other relief, such as a civil action for damages (see 42 U. S. C. § 1983 and *Bivens* v. *Six Agents*, 403 U. S. 388 (1971)), or a criminal prosecution of the responsible

officers (see 18 U. S. C. §§ 241–242). The Constitution does not authorize police officers to coerce confessions or to invade privacy without cause, so long as no use is made of the evidence they obtain. But this Court has held that the Constitution does authorize the government to compel a witness to give potentially incriminating testimony, so long as no incriminating use is made of the resulting evidence. Before the government puts its seal of approval on such an interrogation, it must provide an absolutely reliable guarantee that it will not use the testimony in any way at all in aid of prosecution of the witness. The only way to provide that guarantee is to give the witness immunity from prosecution for crimes to which his testimony relates.

Second, because an immunity statute operates in advance of the interrogation, there is room to require a broad grant of transactional immunity without imperiling large numbers of otherwise valid convictions. An exclusionary rule comes into play after the interrogation or search has occurred; and the decision to question or to search is often made in haste, under pressure, by an officer who is not a lawyer. If an unconstitutional interrogation or search were held to create transactional immunity, that might well be regarded as an excessively high price to pay for the "constable's blunder." An immunity statute, on the other hand, creates a framework in which the prosecuting attorney can make a calm and reasoned decision whether to compel testimony and suffer the resulting ban on prosecution, or to forgo the testimony.

For both these reasons it is clear to me that an immunity statute must be tested by a standard far more demanding than that appropriate for an exclusionary rule fashioned to deal with past constitutional violations. Measured by that standard, the statute approved today by the Court fails miserably. I respectfully dissent.

ZICARELLI *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 69–4. Argued January 11, 1972—Decided May 22, 1972

After appellant invoked the Fifth Amendment and refused to answer questions concerning organized crime, racketeering, and political corruption in Long Branch, New Jersey, appellee Commission granted him statutory immunity "from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate . . . ." Appellant still refused to answer, contending that full transactional immunity was required, that the statutory ban on the use and derivative use of "responsive" answers is unconstitutionally vague, and that the immunity would not protect him from foreign prosecution, of which he has a real and substantial fear. Appellant was adjudged to be in contempt and the judgment was upheld on appeal. The New Jersey Supreme Court, construing the responsiveness limitation, held that "the statute protects the witness against answers and evidence he in good faith believed were demanded." Commission procedure provides for an advance statement of the subject matter of the questioning and permits a witness to have counsel present at the hearing. *Held:*

1. The New Jersey statutory immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and is sufficient to compel testimony. *Kastigar* v. *United States, ante,* p. 441. Pp. 474–476.

2. In light of the State Supreme Court's construction and the context in which the statute operates, the responsiveness limitation is not violative of due process. Pp. 476–478.

3. The self-incrimination privilege protects against real dangers, not remote and speculative possibilities, and here there was no showing that appellant was in real danger of being compelled to disclose information that might incriminate him under foreign law. Pp. 478–481.

55 N. J. 249, 261 A. 2d 129, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and BLACKMUN, JJ., joined. DOUGLAS, J., *post*, p. 481, and MARSHALL, J., *post*, p. 481, filed dissenting statements. BRENNAN and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Michael A. Querques argued the cause for appellant. With him on the brief were *Daniel E. Isles, Harvey Weissbard,* and *Joseph E. Brill.*

Andrew F. Phelan argued the cause and filed a brief for appellee.

George F. Kugler, Jr., Attorney General, argued the cause for the State of New Jersey as *amicus curiae* urging affirmance. With him on the brief were *Barry H. Evenchick* and *Michael R. Perle,* Deputy Attorneys General.

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Robert G. Dixon, Jr., filed a brief for the National District Attorneys Association et al. as *amici curiae* urging affirmance.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case, like *Kastigar* v. *United States, ante*, p. 441, raises questions concerning the conditions under which testimony can be compelled from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination.

The New Jersey State Commission of Investigation [1] subpoenaed appellant to appear on July 8, 1969, to testify concerning organized crime, racketeering, and

[1] The New Jersey Legislature created the Commission primarily to investigate organized crime, racketeering, and political corruption in New Jersey. N. J. Rev. Stat. §§ 52:9M–1 and 52:9M–2 (1970 and Supp. 1971–1972).

political corruption in Long Branch, New Jersey.[2] In the course of several appearances before the Commission, he invoked his privilege against self-incrimination and refused to answer a series of 100 questions. The Commission granted him immunity pursuant to N. J. Rev. Stat. § 52:9M–17 (a) (1970), and ordered him to answer the questions. Notwithstanding the grant of immunity, he persisted in his refusal to answer. The Commission then petitioned the Superior Court of Mercer County for an order directing appellant to show cause why he should not be adjudged in contempt of the Commission and committed to jail until such time as he purged himself of contempt by testifying as ordered. At the hearing on the order to show cause, appellant challenged the order to testify on several grounds, one of which was that the statutory immunity was insufficient in several respects to compel testimony over a claim of the privilege. The Superior Court rejected this contention, and ordered appellant incarcerated until such time as he testified as ordered. The Supreme Court of New Jersey certified appellant's appeal before argument in the Appellate Division, and affirmed the judgment of the Superior Court. *In re Zicarelli*, 55 N. J. 249, 261 A. 2d 129 (1970). This Court noted probable jurisdiction and set the case for argument to consider appellant's challenges to the sufficiency of the immunity authorized by the statute. 401 U. S. 933 (1971.)

I

A majority of the members of the Commission have authority to confer immunity on a witness who invokes

[2] The New Jersey Code of Fair Procedure requires that persons summoned to testify before the Commission be served prior to the time they are required to appear with a statement of the subject of the investigation. N. J. Rev. Stat. § 52:13E–2 (1970). The subpoena served on appellant contained this statement. App. 3a.

the privilege against self-incrimination.[3] After the witness testifies under the grant of immunity, the statute provides that:

> "he shall be immune from having such responsive answer given by him or such responsive evidence produced by him, or evidence derived therefrom used to expose him to criminal prosecution or penalty or to a forfeiture of his estate, except that such person may nevertheless be prosecuted for any perjury committed in such answer or in producing such evidence, or for contempt for failing to give an answer or produce evidence in accordance with the order of the commission . . . ." N. J. Rev. Stat. § 52:9M–17 (b) (1970).

This is a comprehensive prohibition on the use and derivative use of testimony compelled under a grant of immunity.[4] Appellant contends that only full transactional immunity affords protection commensurate with that afforded by the privilege and suffices to compel testimony over a claim of the privilege. We rejected this argument today in *Kastigar,* where we held that immunity from use and derivative use is coextensive with the scope of the privilege, and is therefore sufficient to compel testimony. We perceive no difference between the degree of protection afforded by the New Jersey statute and that afforded by the federal statute sustained in *Kastigar.*

Appellant also contends that while immunity from use and derivative use may suffice to secure the protection of the privilege from invasion by jurisdictions other than the jurisdiction seeking to compel testimony, that jurisdiction must grant the greater protection afforded by transactional immunity. In *Kastigar,* we held that

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[3] N. J. Rev. Stat. § 52:9M–17 (a) (1970).

[4] See *In re Zicarelli,* 55 N. J. 249, 270, 261 A. 2d 129, 140 (1970).

immunity from use and derivative use is commensurate with the protection afforded by the privilege, and rejected the notion that in our federal system a jurisdiction seeking to compel testimony must grant protection greater than that afforded by the privilege in order to supplant the privilege and compel testimony. Our holding in *Kastigar* is controlling here.

II

Appellant contends that the immunity provided by the New Jersey statute is unconstitutionally vague because it immunizes a witness only against the use and derivative use of "responsive" answers and evidence, without providing statutory guidelines for determining what is a "responsive" answer. The statute does not come to us devoid of interpretation, for the Supreme Court of New Jersey construed the responsiveness limitation as follows:

> "The limitation is intended to prevent a witness from seeking undue protection by volunteering what the State already knows or will likely come upon without the witness's aid. The purpose is not to trap. Fairly construed, the statute protects the witness against answers and evidence he in good faith believed were demanded." 55 N. J., at 270–271, 261 A. 2d, at 140.

This is not the technical construction of "responsive" in the legal evidentiary sense that appellant fears,[5] but, rather, is a construction cast in terms of ordinary English usage[6] and the good-faith understanding of the average man. The term "responsive" in ordinary English usage has a well-recognized meaning. It is not,

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[5] See 3 J. Wigmore, Evidence § 785, pp. 200–202 (J. Chadbourn rev. 1970).

[6] Cf. *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964); *Hoffman* v. *United States*, 341 U. S. 479, 487 (1951).

as appellant argues, "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926).

Moreover, the contention that ambiguity in the term "responsive" poses undue hazards for a witness testifying under a grant of immunity must be considered in the context in which the statute operates. This is not a penal statute that requires an uncounseled decision by a layman as to what course of action is lawful to pursue. A witness before the Commission is entitled to have in advance of his testimony a statement of the subject matter on which the Commission intends to examine him.[7] This advance notice of the subject of the inquiry will provide a background and context that will aid a witness in determining what information the questions seek. The New Jersey statute further provides that a witness before the Commission is entitled to have counsel present during the course of the hearing,[8] and counsel may secure clarification of vague or ambiguous questions in advance of a response by the witness.[9] The responsiveness limitation is not a trap for the unwary; rather it is a barrier to those who would intentionally tender information not sought in an effort to frustrate and prevent criminal prosecution.[10] The con-

[7] N. J. Rev. Stat. § 52:13E–2 (1970).

[8] N. J. Rev. Stat. § 52:13E–3 (1970).

[9] Appellant does not contend that counsel, although present, is so limited in his role that he cannot obtain clarification of any questions that the witness does not understand fully. Counsel for the Commission states that a witness may even object to questions on the ground that they are not relevant to the subject matter of the inquiry, and obtain a court ruling on relevancy before being required to answer. Appellee's Brief 81–82.

[10] *In re Zicarelli*, 55 N. J., at 270–271, 261 A. 2d, at 140. See generally Comment, The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope, 72 Yale L. J. 1568, 1572 (1963).

text in which the statute operates [11] reaffirms our conclusion that the responsiveness limitation does not violate the Due Process Clause of the Fourteenth Amendment.

III

Appellant further asserts that he cannot be compelled to testify before the Commission because his testimony would expose him to danger of foreign prosecution. He argues that he has a real and substantial fear of foreign prosecution, and that he cannot be compelled to incriminate himself under foreign law. It follows, he insists, that he cannot be compelled to testify, irrespective of the scope of the immunity he receives, because neither the New Jersey statute nor the Fifth Amendment privilege can prevent either prosecution or use of his testimony by a foreign sovereign. This Court noted probable jurisdiction to consider appellant's claim that a grant of immunity cannot supplant the Fifth Amendment privilege with respect to an individual who has a real and substantial fear of foreign prosecution. We have concluded, however, that it is unnecessary to reach the constitutional question in this case.

It is well established that the privilege protects against real dangers, not remote and speculative possibilities.[12] At the hearing before the Superior Court of Mercer County, appellant introduced numerous newspaper and magazine articles bearing upon his self-incrimination claim. He called a number of these articles to the court's attention in an effort to demonstrate the basis of a fear

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[11] Appellant refused to answer 100 questions. None of these questions is pointed to as an example of a question that is so vague that an ordinary man could not determine what information the question seeks.

[12] *E. g., Mason* v. *United States*, 244 U. S. 362 (1917); *Heike* v. *United States*, 227 U. S. 131, 144 (1913); *Brown* v. *Walker*, 161 U. S. 591, 599–600 (1896); *Queen* v. *Boyes*, 1 B. & S. 311, 329–331, 121 Eng. Rep. 730, 738 (Q. B. 1861).

of foreign prosecution.[13] These articles labeled appellant the "foremost internationalist" in organized crime,[14] and detailed his alleged participation in unlawful ventures growing out of alleged interests and activities in Canada[15] and the Dominican Republic.[16]

While these articles would lend support to a claim of fear of foreign prosecution in the abstract, they do not support such a claim in the context of the questions asked by the Commission. Of the 100 questions he refused to answer, appellant cites only one specific question[17] as posing a substantial risk of incrimination

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[13] Cf. *Hoffman* v. *United States,* 341 U. S., at 489.

[14] Life, Sept. 8, 1967, p. 101.

[15] Life, Aug. 9, 1968, p. 24.

[16] Life, Sept. 8, 1967, p. 101. Appellant also alleges that these articles support his claim of a real and substantial danger of prosecution by Venezuela. The only reference to Venezuela, however, is a statement that appellant "has holdings in Venezuela." Life, Sept. 1, 1967, at 45.

[17] Appellant also raises a vague objection on grounds of incrimination under foreign law to these five questions:

"Q. Are you a member of any secret organization that is dedicated to or whose principle is to pursue crime and protect those of its members who do commit crime?" App. 8a.

"Q. Do you know that organization by the name Cosa Nostra?" App. 17a.

"Q. Are you a member of the organization known as Cosa Nostra?" App. 18a.

"Q. In whose family of Cosa Nostra are you a member?

"Q. Do you know Joseph Bonanno?" App. 20a.

These questions do not seek answers concerning foreign involvements or foreign criminal activity. Indeed, they do not relate to criminal acts. Nor is it even remotely likely that their answers could afford "a link in the chain of evidence" needed to prosecute appellant in a foreign jurisdiction. Cf. *Blau* v. *United States,* 340 U. S. 159, 161 (1950). For if appellant identified himself as a member of the Cosa Nostra in the "family" of Joseph Bonanno, he would only confirm an assumption widely held by law enforcement authorities. See, *e. g.,* S. Rep. No. 91-617, p. 38 (1969). To confirm the operating assumption of law enforcement authorities hardly provides a new "link" to evidence that could be used in a foreign prosecution.

under foreign law. That question is: "In what geographical area do you have Cosa Nostra responsibilities?"

We think it plain from the context in which the question was asked that it sought an answer concerning geographical areas in New Jersey. The subject of the hearing was law enforcement, organized crime, racketeering, and political corruption in the city of Long Branch, which is located in Monmouth County, New Jersey. Eleven of the 13 questions preceding the question under consideration related specifically to the city of Long Branch and Monmouth County.[18] Of course, neither the fact that the Commission was not seeking information concerning appellant's activities outside the United States, nor the fact that the question was not designed to elicit such information, is dispositive of appellant's claim that an answer to the question would incriminate him under foreign law. When considering whether a claim of the privilege should be sustained, the court focuses inquiry on what a truthful answer might disclose, rather than on what information is expected by the questioner.[19] But the context in which a question is asked imparts additional meaning to the question, and clarifies what information is sought. A question to which a claim of the privilege is interposed must be considered "in the setting in which it is asked." *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951).

Considering this question in light of the circumstances in which it was asked, we agree with the conclusion of the Supreme Court of New Jersey that appellant was never in real danger of being compelled to disclose information that might incriminate him under foreign law. Even if appellant has international Cosa Nostra responsibilities, he could have answered this question truth-

[18] The question under consideration was followed by the question: "Is Monmouth County within that geographical area?"

[19] See *Hoffman* v. *United States*, 341 U. S. 479 (1951).

fully without disclosing them. Should he have found it necessary to qualify his answer by confining it to domestic responsibilities in order to avoid incrimination under foreign law, he could have done so. To have divulged international responsibilities would have been to volunteer information not sought, and apparently not relevant to the Commission's investigation. We think that in the circumstances of the questioning this was clear to appellant and his counsel.

Appellant is of course free to purge himself of contempt by answering the Commission's questions. Should the Commission inquire into matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution, and should such inquiry be sustained over a relevancy objection,[20] then a constitutional question will be squarely presented. We do not believe that the record in this case presents such a question.

The judgment of the Supreme Court of New Jersey accordingly is

Affirmed.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar* v. *United States*, *ante*, p. 462.

MR. JUSTICE MARSHALL dissents for the reasons stated in his dissenting opinion in *Kastigar* v. *United States*, *ante*, p. 467.

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[20] See n. 9, *supra*.

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SARNO ET AL. *v.* ILLINOIS CRIME INVESTIGATING COMMISSION

CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 70–7. Argued January 11, 1972—Decided May 22, 1972

Since neither party contends that the scope of Illinois statutory immunity falls below the use and derivative use standard held to be coextensive with the privilege against self-incrimination in *Kastigar* v. *United States*, *ante*, p. 441, any uncertainty regarding the scope of protection in excess of the constitutional requirement should best be left to the Illinois courts.

45 Ill. 2d 473, 259 N. E. 2d 267, certiorari dismissed as improvidently granted.

Frank G. Whalen argued the cause and filed a brief for petitioners.

Joel M. Flaum, First Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott*, Attorney General, and *Jayne A. Carr*, Assistant Attorney General.

Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

PER CURIAM.

Petitioners were ordered to testify before the Illinois Crime Investigating Commission under a grant of immunity conferred pursuant to Ill. Rev. Stat., c. 38, § 203–14 (1969). The occasion for granting the writ in this case was to consider whether Illinois must demonstrate to petitioners, prior to an adjudication for contempt for refusal to answer the Commission's questions, that immunity as broad in scope as the protection of the privilege against self-incrimination is available and applicable to them. 401 U. S. 935 (1971). The writ was granted in light of petitioners' claim that the statute did not provide complete transactional immunity. On the same day that the writ was granted, probable jurisdiction was noted in *Zicarelli* v. *New Jersey State Commission of Investigation*, 401 U. S. 933 (1971), to resolve the ques-

tion whether a State can compel testimony from an unwilling witness, who invokes the privilege against self-incrimination, by granting immunity from use and derivative use of the compelled testimony, or whether transactional immunity is required.

We held today in *Kastigar* v. *United States, ante,* p. 441, and in *Zicarelli* v. *New Jersey State Commission of Investigation, ante,* p. 472, that testimony may be compelled from an unwilling witness over a claim of the privilege against self-incrimination by a grant of use and derivative use immunity. The premise of petitioners' arguments is that transactional immunity is required. They say that Illinois failed to demonstrate satisfactorily that transactional immunity was provided, but they do not contend that the Illinois immunity statute affords protection less comprehensive than use and derivative use immunity. Respondent asserts that the statute affords complete transactional immunity, reflecting a long-standing Illinois policy of providing immunity greater than that required by the United States Constitution. Since neither party contends that the scope of the immunity provided by the Illinois statute falls below the constitutional requirement set forth in *Kastigar,* we conclude that any uncertainty regarding the scope of protection in excess of the constitutional requirement should best be left to the courts of Illinois. Accordingly, the writ of certiorari is dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Kastigar* v. *United States, ante,* p. 462.

MR. JUSTICE MARSHALL dissents for the reasons stated in his dissenting opinion in *Kastigar* v. *United States, ante,* p. 467.

UTAH *v.* UNITED STATES

No. 31, Orig. Decided June 7, 1971—
Decree Entered May 22, 1972

Opinion reported: 403 U. S. 9.

DECREE

It is ordered, adjudged and decreed that:

1. The United States of America, its departments and agencies are enjoined, subject to any regulations which the Congress may impose, such as in the interest of navigation or pollution control, from asserting against the State of Utah any claim of right, title, and interest:

(a) to the bed of the Great Salt Lake lying below the water's edge of Great Salt Lake on June 15, 1967,* with the exception of any lands within the Bear River Migratory Bird Refuge and the Weber Basin federal reclamation project;

(b) to the natural resources and living organisms in or beneath the bed of the Great Salt Lake as delineated in (a) above; and

(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, as delineated in (a) above.

2. The State of Utah is not required to pay the United States, through the Secretary of the Interior, for the lands, including any minerals, delineated in paragraph 1 above of this decree.

3. The basic question yet to be determined in this case is whether prior to June 15, 1967, the claimed doctrine

*The date of the deed from the United States to Utah.

of reliction applies and, if so, whether the doctrine of reliction vests in the United States, and thus divests the State of Utah, of any right, title, or interest to any or all of the exposed shorelands situated between the water's edge on June 15, 1967, and the meander line of the Great Salt Lake as duly surveyed prior to or in accordance with § 1 of the Act of June 3, 1966, 80 Stat. 192. A Special Master will be appointed by the Court to hold such hearings, take such evidence, and conduct such proceedings as he deems appropriate and, in due course, to report his recommendations to the Court.

4. There also remains the question whether the lands within the meander line of the Great Salt Lake (as duly surveyed prior to or in accordance with § 1 of the Act of June 3, 1966, 80 Stat. 192), and thus conveyed to the State of Utah, included any federally owned uplands above the bed of the Lake on the date of statehood (January 4, 1896) which the United States still owned prior to the conveyance to Utah. The Special Master appointed by the Court as provided in paragraph 3 above will also be directed to hold such hearings, take such evidence, and conduct such proceedings with respect to this question as he deems appropriate in light of his determinations with respect to the issues referred to him in paragraph 3 above and, in due course, to report his recommendations to the Court.

5. The prayer of the United States of America in its answer to the State of Utah's Complaint that this Court "confirm, declare and establish that the United States is the owner of all right, title and interest in all of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title

or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended," is denied.

Syllabus

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL–CIO *v.* FLAIR BUILDERS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71–41. Argued April 10, 1972—Decided May 30, 1972

Petitioner union brought an action in June 1968 seeking damages and injunctive relief for respondent's alleged breach of their collective-bargaining agreement, charging that respondent had "continually violated" the contract since June 1966 by refusing to abide by any of its terms. The agreement provided for arbitration "of any difference . . . which cannot be settled . . . within 48 hours of the occurrence." The District Court held that respondent "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause," but found the union guilty of laches and dismissed the action. The Court of Appeals affirmed. *Held:* As the District Court found, the parties did agree to arbitrate and, the existence and scope of an arbitration clause being matters for judicial decision, the phrase "any difference" encompasses the issue of laches within the broad sweep of its arbitration coverage. Pp. 490–492.

440 F. 2d 557, reversed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed a dissenting opinon, in which BURGER, C. J., joined, *post*, p. 492.

Bernard M. Baum argued the cause for petitioner. With him on the brief were *Daniel S. Shulman* and *Robert H. Baum.*

J. Robert Murphy, by invitation of the Court, 405 U. S. 972, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In November 1968, petitioner brought an action in the United States District Court for the Northern District of Illinois, seeking damages and injunctive relief for an alleged breach by respondent of their collective-bargaining agreement. The complaint charged that since June 1, 1966, respondent had "continually violated" the contract by refusing to abide by any of its terms, including wage, hiring hall, and fringe benefit provisions. The agreement, which incorporated the terms of master contracts between petitioner and a local contractors' association, provided for arbitration of "any difference . . . between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence."

The District Court dismissed petitioner's action for failure to state a claim and noted, but did not pass upon, two additional contentions of the company—"that (1) no contract was ever created, and (2) . . . if consummated, the agreement was subsequently abandoned by the union." No. 68–C–2091 (April 14, 1969) (unreported). The court suggested that the parties arbitrate the binding effect of their contract. When the company refused to arbitrate either that issue or "the subsequent issues of possible violations," petitioner filed an amended complaint to compel arbitration.

In moving to dismiss the amended complaint, respondent again denied the existence of a binding agreement and argued that the Union's delay in seeking arbitration constituted laches barring enforcement of the contract. The District Court initially denied the motion, holding that "if the employer consented to the alleged collective bargaining agreement, the laches issue should be decided by the arbitrator rather than the federal courts." *Id.* (Aug. 26, 1969) (unreported). But after conducting an evidentiary hearing on the scope of the ar-

bitration clause, the court entered an order dismissing the complaint. *Id.* (Dec. 4, 1969) (unreported). Though agreeing that respondent "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause," the court found that there had been no contact between the parties from the time of the signing in 1964 until the summer of 1968. It therefore concluded that the Union was guilty of laches in seeking enforcement:

> "The master agreement contemplates initiation of arbitration proceedings if any dispute is not settled within 48 hours of its occurrence, and further provides that the Board of Arbitrators shall meet 'within six (6) days.' Yet demand for arbitration was not made in this case until April, 1969, almost five years from Flair's first alleged failure to comply with the contract and nearly three years from the inception of the alleged breach sought to be arbitrated.
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> . . . . .
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> "To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. . . . [T]o compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment."

The Court of Appeals affirmed the order by divided vote. 440 F. 2d 557 (1971). Its opinion read the memorandum of the District Court to hold that the collective-bargaining agreement was still in effect and that therefore the question for decision was "whether a court may properly dismiss the complaint on the basis of laches resulting from dilatory notification of the exist-

ence of a dispute in a suit brought to compel arbitration with regard to the dispute." *Id.*, at 557–558. The court then addressed this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). There an employer refused to arbitrate on the ground that the union, among other things, had failed to follow grievance procedures required by the collective-bargaining agreement. We ordered arbitration, holding that "[o]nce it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.*, at 557. The Court of Appeals distinguished *Wiley* on the ground that the procedural question there concerned "intrinsic" untimeliness, relating solely to the requirements of the contract. Here, on the other hand, the question was one of "extrinsic" untimeliness, based not on a violation of contract procedures but on the failure to give timely notice under the equitable doctrine of laches. Therefore, according to the court, the matter was within its province to decide, for " 'we are not indulging in the judicially unwarranted task of interpreting the collective bargaining agreement.' " 440 F. 2d, at 560, quoting *Amalgamated Clothing Workers* v. *Ironall Factories Co.*, 386 F. 2d 586, 591 (CA6 1967). We granted certiorari. 404 U. S. 982 (1971).

Petitioner contends that the Court of Appeals erred in limiting *Wiley* to cases of "intrinsic" delay because the issue of delay, whether "intrinsic" or not, "necessarily involves a determination of the merits of the dispute and bears directly upon the outcome and is accordingly for an arbitrator and not the federal court to decide." Brief for Petitioner 21. In other words, petitioner argues that even if the parties have not agreed to arbitrate the laches issue, *Wiley* requires that the arbitrator resolve

the question as an integral part of the underlying contract dispute.

We need not reach the question posed by petitioner, for we find that the parties did in fact agree to arbitrate the issue of laches here. Although respondent denies that it ever signed a binding contract with petitioner, the District Court found to the contrary and held that the company "was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause." That clause applies to "any difference," whatever it may be, not settled by the parties within 48 hours of occurrence. There is nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration. In that circumstance, we must conclude that the parties meant what they said—that "any difference," which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision.* The District Court ignored the plain meaning of the clause in deciding that issue.

Of course, nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue, as well as the scope of the arbitration clause, remains a matter for judicial decision. See *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238, 241 (1962). But once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to "any difference" between them, then a claim that

*Respondent's attorney admitted as much in the hearing before the District Court. Though contending that the binding effect of the contract was an issue for the court, and not the arbitrator, he agreed that "laches is another thing. I can go along on this being an arbitrable question, I suppose, if you have got a contract . . . ." App. 93.

particular grievances are barred by laches is an arbitrable question under the agreement. Compare *Iowa Beef Packers, Inc.* v. *Thompson*, 405 U. S. 228 (1972). Having agreed to the broad clause, the company is obliged to submit its laches defense, even if "extrinsic," to the arbitral process. The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

Through the exercise of formal logic the majority reaches a result that I believe is unjust. A full statement of the facts is necessary to put this case in proper perspective. Flair Builders, Inc. (Flair), is a small independent construction firm. The International Union of Operating Engineers, Local 150, AFL–CIO (the Union), had a master collective-bargaining agreement in effect with many contractor associations in Flair's area. On May 12, 1964, the Union and Flair signed a memorandum agreement which adopted the terms of the then-existing master bargaining agreement. The memorandum provided that Flair would be bound by any future master agreement entered between the Union and the contractor associations. Flair had only *one* employee at the time it signed the memorandum agreement with the Union. This employee joined the Union, but left Flair's employment about two weeks later. His job was filled successively by employees who operated the only piece of equipment owned by Flair. None of these successor employees belonged to the Union.

In the ensuing years, Flair prospered and added a modest amount of additional equipment. By 1967 it owned four pieces. Throughout the period from May 1964 until the summer of 1968, Flair operated all of its equipment with nonunion employees. During this period of more

than four years, Flair heard nothing whatever from the Union.

In 1966, without Flair's knowledge, the Union and the contractor associations entered into a new master agreement which contained a provision that: "Should any difference arise between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence, such difference shall be submitted to arbitration." It further provided that the arbitrators should meet within six days after it was determined that the dispute could not be settled. Although Flair was not a party to the new 1966 master agreement, and received no notice of its execution from the Union, the District Court determined that Flair was "bound" by virtue of the incorporation provision in the memorandum agreement signed in 1964.

It is apparent that the Union either forgot about its 1964 agreement with Flair or considered Flair's small operation to be of no consequence. For a long time everyone seemed happy, and things went well. Then in June 1968, *four years* after the agreement was entered, a Union business agent visited Flair. This was the first such visit since May 1964. The business agent found that Flair's four employees were nonunion, and he also complained about their wages. Flair refused to recognize any obligation to the Union.

After the lapse of another five months, on November 7, 1968, the Union filed a complaint against Flair in the District Court seeking specific performance of the alleged collective-bargaining agreement and monetary damages in the amount of $100,000. Flair's motion to dismiss for failure to state a cause of action was sustained by the District Court on April 14, 1969, in a memorandum opinion which suggested that the parties arbitrate their differences. Pursuant to leave of court, the Union filed an amended complaint on June 3, 1969, alleging that on

April 18, 1969, the Union had demanded "immediate arbitration" and that Flair had refused. In its answer to the amended complaint, Flair asserted various defenses, including abandonment of the contract and laches in asserting "any purported rights or claims thereunder."

After an evidentiary hearing, the District Court concluded that the Union had been "guilty of laches by its unjustified delay in the enforcement of its contract with defendant," and dismissed the complaint. The Court of Appeals for the Seventh Circuit, with one judge dissenting, agreed that laches was a bar to the Union's belated assertion of the right to arbitrate, and affirmed the judgment of the District Court.

In its opinion today, the Court looks solely at the clause in the master collective-bargaining agreement which provided for arbitration of "any difference" between the parties, and holds:

> "[T]hat the parties meant what they said—that 'any difference,' which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision." [1]

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[1] It should be noted that this language was added to the master contract in 1966 without the knowledge of Flair, at a time when it had every reason to believe that the Union—from which it had heard nothing for more than two years—had abandoned the initial memorandum agreement of May 12, 1964. Flair had no union employees, and had received no demands or notices of any kind from the Union. But whatever the situation may have been in 1966, the subsequent history of this remarkable performance corroborates the view that neither Flair nor the Union was conscious of the existence of a collective-bargaining agreement or of a right to arbitrate anything.

Even after a union business agent visited Flair's jobsite in 1968 and discovered "a non-union employee operating a piece of equipment," no action was taken by the Union until a suit for specific performance and damages was filed some five months later. No demand was made for arbitration, and no claim of any right to arbitration was made in the original complaint. The District Court,

Yet the phrase "any difference," if given its normal meaning in a labor contract, refers to disputes relating to hours, wages, fringe benefits, seniority, grievances, and to other issues customarily arising within the terms of a collective-bargaining agreement. I cannot believe that this language was intended to include the arbitration of an equitable defense asserted against the enforceability of the *entire* contract. Indeed, the Union itself did not construe the language to cover arbitration of this issue, as it asserted no such claim until after the District Court suggested it.[2]

But my dissent does not turn solely on an interpretation of the arbitration clause or of any other provision of the agreement. The defense of laches is equitable in nature. The customary situation in which it is invoked is where a contract *does* exist and, but for laches of one of the parties, would be enforceable. In this case, Flair relied in substance on two defenses: (i) that the 1964 memorandum agreement (the only agreement Flair ever signed) had been abandoned by the Union; and (ii) that even if it had not been abandoned and the arbitration clause was as broad as this Court construes it to be, the defense of laches was available as an affirmative defense. The essence of the latter defense is that the Union, by virtue of its conduct and Flair's reliance thereon, was estopped and precluded from enforcing any and all provisions of the contract, including the arbitration clause. This position was sustained by the courts below. The Court of Appeals correctly held:

> "The factual context of this appeal thus narrows the issue before us to the question of whether a party

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not the Union, first suggested the possibility of arbitration. In these circumstances, and with all respect, I find no support whatever in the record for the Court's holding "that the parties did in fact agree to arbitrate."

[2] See n. 1, *supra*.

> to a collective bargaining agreement which contains an arbitration clause may be so dilatory in making the existence of vaguely delineated disputes known to the other party that a court is justified in refusing to compel the submission of such disputes to arbitration." 440 F. 2d 557, 559 (1971).

The District Court, which heard the testimony of the parties, emphasized the burden imposed upon Flair by the Union's prolonged and unexplained delay and the ambiguity of its various positions:

> "To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment."

I am aware of the strong policy considerations in favor of the arbitration of union-management disputes. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). But neither *Wiley*, nor any other case to my knowledge, has forced arbitration upon a party in circumstances such as these, where the equitable doctrine of laches was clearly applicable and was asserted. We would be well advised to recall Chief Justice Marshall's admonition:

> "[I]t is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in

the power of the court to do so." *Church* v. *Hubbart*, 2 Cranch 187, 232 (1804).

The effect of today's decision on Flair seems fairly clear. The Court's opinion imposes on this small business the "extreme burden" that the District Court found would result from requiring arbitration. Mr. Justice Cardozo once observed that litigation is a rare and catastrophic experience for the vast majority of men.[3] If Flair survives the long excursion to this Court, the arbitration that the majority requires, and a possible return to the District Court which already has ruled in its favor, it surely possesses more tenacity and better financial resources than the average small business. One may doubt whether many small businessmen would believe today's result possible.

The effect of the Court's decision also could be far reaching in the law of labor-management relations. It appears that the long-accepted jurisdiction of the courts may now be displaced whenever a collective-bargaining agreement contains a general arbitration clause similar to that here involved. If in such circumstances the affirmative defense of laches can no longer be invoked in the courts, what of other affirmative defenses that go to the enforceability of a contract? Does the Court's opinion vest in arbitrators the historic jurisdiction of the courts to determine fraud or duress in the inception of a contract? It seems to me that the courts are far better qualified than any arbitrators to decide issues of this kind. These are not questions of "labor law," nor are they issues of fact that arbitrators are peculiarly well qualified to consider. They are issues within the traditional equity jurisdiction of courts of law and issues which the courts below appropriately resolved. I would affirm the judgment of the Court of Appeals.

[3] B. Cardozo, The Nature of the Judicial Process 128 (1921).

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LAKE CARRIERS' ASSN. ET AL *v.* MacMULLAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

No. 71–422. Argued March 22–23, 1972—Decided May 30, 1972

Michigan's Watercraft Pollution Control Act of 1970, appellees maintain, prohibits the discharge of sewage, whether treated or untreated, in Michigan waters and requires vessels with marine toilets to have sewage storage devices. Appellants, the Lake Carriers' Association and members owning or operating Great Lakes bulk cargo vessels, filed a complaint for declaratory and injunctive relief, contending that the Act unduly burdens interstate and foreign commerce; contravenes uniform maritime law; violates due process and equal protection requirements; and is invalid under the Supremacy Clause primarily because of conflict with or pre-emption by the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970. That law appears to contemplate sewage control after appropriate federal standards have been issued through on-board treatment before disposal in navigable waters, unless the Administrator of the Environmental Protection Agency provides on special application for a complete prohibition on discharge in designated areas. A three-judge District Court dismissed the complaint for lack of a justiciable controversy. The court also found "compelling reasons to abstain from consideration of the matter in its present posture"—the attitude of the Michigan authorities, who are not threatening criminal prosecution but are seeking industry cooperation; the availability of declaratory relief in the Michigan courts; the possibility of a complete prohibition on the discharge of sewage in Michigan's navigable waters under federal law; the absence of existing conflict between the Michigan requirements and other state laws; and the publication of proposed federal standards that Michigan might consider in interpreting and enforcing its law. *Held:*

1. The complaint presents an "actual controversy" within the meaning of the Declaratory Judgment Act because the obligation to install sewage storage devices under the Michigan statute is presently effective in fact. Pp. 506–508.

2. Abstention is permissible "only in narrowly limited 'special circumstances,'" *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), justifying "the delay and expense to which application of the abstention doctrine inevitably gives rise." *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964). Those circumstances do not include the majority of grounds given by the District Court. Pp. 509–510.

(a) The absence of an immediate threat of prosecution is not a reason for abstention. In the absence of a pending state proceeding, exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met. *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), distinguished. Pp. 509–510.

(b) The availability of declaratory relief in state courts on federal claims is not a reason for abstention. *Zwickler* v. *Koota*, *supra*, at 248. P. 510.

(c) Just as the possibility of a complete prohibition on the discharge of sewage in Michigan's navigable waters under federal law and the asserted absence of existing conflict between the Michigan requirements and other state laws do not diminish the immediacy and reality of appellants' grievance, they do not call for abstention. P. 510.

3. The Michigan statute, however, is unclear in particulars that go to the foundation of appellants' grievance and has not yet been construed by any Michigan court. In this circumstance abstention was appropriate because authoritative resolution of those ambiguities in the state courts is sufficiently likely to "avoid or modify the [federal] constitutional [questions]," *Zwickler* v. *Koota*, *supra*, at 249, appellants raise to warrant abstention, particularly in view of the absence of countervailing considerations found compelling in prior decisions. Pp. 510–513.

336 F. Supp. 248, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed a statement concurring in the result, in which REHNQUIST, J., joined, *post*, p. 513. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 513.

Scott H. Elder argued the cause for appellants. With him on the briefs was *John A. Hamilton*.

Robert A. Derengoski, Solicitor General of Michigan, argued the cause for appellees. With him on the brief were *Frank J. Kelley,* Attorney General, and *Jerome Maslowski* and *Francis J. Carrier,* Assistant Attorneys General.

Briefs of *amici curiae* urging reversal were filed by *Robert A. Jenkins* and *Fenton F. Harrison* for the Dominion Marine Assn., and by *Nicholas J. Healy* and *Gordon W. Paulsen* for Assuranceforeningen Gard et al.

Louis J. Lefkowitz, Attorney General, *pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Thomas F. Harrison* and *Philip Weinberg,* Assistant Attorneys General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This is an appeal from the judgment of a three-judge District Court, convened under 28 U. S. C. §§ 2281, 2284, dismissing a complaint to have the Michigan Watercraft Pollution Control Act of 1970, Mich. Comp. Laws Ann. § 323.331 *et seq.* (Supp. 1971), declared invalid and its enforcement enjoined. 336 F. Supp. 248 (1971). We noted probable jurisdiction, 404 U. S. 982 (1971), and affirm the District Court's determination to abstain from decision pending state court proceedings.

The Michigan statute, effective January 1, 1971, provides in pertinent part:

> "Sec. 3. (1) A person [defined in § 2 (i) to mean "an individual, partnership, firm, corporation, association or other entity"] shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any . . . sewage [defined in § 2 (d) to mean "all human body wastes, treated or untreated"] . . . or other liquid or solid materials

which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

"(2) It is unlawful to discharge, dump, throw or deposit . . . sewage . . . from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

"Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction, may be approved by the [State Water Resources Commission of the Department of Natural Resources] to operate on the waters of this state.

"(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft [defined in § 2 (g) to include "foreign and domestic vessels engaged in commerce upon the waters of this state" as well as "privately owned recreational watercraft"] having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

"(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

"(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

. . . . .

"Sec. 8. . . . Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys . . . [of] the watercraft which utilize the docks or wharfs.

. . . . .

"Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

"Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

Appellees—the State Attorney General, the Department of Natural Resources and its Director, and the Water Resources Commission and its Executive Secretary—read these provisions as prohibiting the discharge of sewage, whether treated or untreated, in Michigan waters and as requiring vessels with marine toilets to have sewage storage devices.

Appellants—the Lake Carriers' Association and individual members who own or operate federally enrolled and licensed Great Lakes bulk cargo vessels—challenge the Michigan law on a variety of grounds. They urge that the Michigan law is beyond the State's police power and places an undue burden on interstate and foreign commerce, impermissibly interferes with uniform maritime law, denies them due process and equal protection of the laws, and is unconstitutionally vague. They also contend that the Michigan statute conflicts with or is

pre-empted by federal law, primarily [1] the Federal Water Pollution Control Act, as amended by the Water Quality Improvement Act of 1970, and is therefore invalid under the Supremacy Clause. Under the Water Quality Improvement Act, the Administrator of the Environmental Protection Agency [2] is directed "[a]s soon as possible, after April 3, 1970, . . . [to] promulgate Federal standards of performance for marine sanitation devices . . . which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States from new vessels and existing vessels, except vessels not equipped with installed toilet facilities." 84 Stat. 100, 33 U. S. C. § 1163 (b)(1).[3] These standards, which as of now are not issued,[4] are to become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. 84 Stat. 101, 33 U. S. C. § 1163 (c)(1). Thereafter, "no State . . . shall adopt or enforce any statute or regulation . . . with respect to the

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[1] Appellants also contend that the Michigan law is pre-empted by the Steamboat Inspection Acts of Feb. 28, 1871, 16 Stat. 440, and of May 27, 1936, 49 Stat. 1380, as amended, 46 U. S. C. § 361 *et seq.* An *amicus curiae*, moreover, presses the contention, suggested in appellants' complaint, that the Michigan law conflicts with the United States-Canadian Boundary Waters Treaty of 1909, 36 Stat. 2448, as well as enters into the domain of foreign affairs constitutionally reserved to the National Government. See Brief of Dominion Marine Association *amicus curiae*.

[2] The authority to administer the Water Quality Improvement Act, originally lodged in the Secretary of the Interior, was transferred to the Administrator of the Environmental Protection Agency by Reorganization Plan No. 3 of 1970, set out in the Appendix to Title 5 of the United States Code.

[3] "Sewage" is defined under the Act to mean "human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes." 84 Stat. 100, 33 U. S. C. § 1163 (a)(6).

[4] A notice of proposed standards was, however, published on May 12, 1971. See 36 Fed. Reg. 8739.

design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section." *Id.*, § 1163 (f). However, "[u]pon application by a State, and where the Administrator determines that any applicable water quality standards require such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into those waters of such State which are the subject of the application and to which such standards apply." *Ibid.* Thus, the federal law appears to contemplate sewage control through onboard treatment before disposal in navigable waters, unless the Administrator provides on special application for a complete prohibition on discharge in designated areas.

The District Court below did not reach the merits of appellants' complaint on the ground that "the lack of a justiciable controversy precludes entry of this Court into the matter." 336 F. Supp., at 253.[5] "An overview of the factual situation presented by the evidence in this case," said the District Court, "compels but one conclusion: that the plaintiffs here are seeking an advisory

[5] The District Court also noted that "[w]ith regard to pre-emption, the Supreme Court in Swift & Co. v. Wickham, 382 U. S. 111 [1965], held that Supremacy Clause cases are not within the purview of a three judge court." 336 F. Supp., at 253. Appellants correctly point out that in reinstating that rule, *Wickham* made clear that a three-judge court *is* the proper forum for all claims against the challenged statute so long as there is a nonfrivolous constitutional claim that constitutes a justiciable controversy and warrants, on allegations of irreparable harm, consideration for injunctive relief. See 382 U. S., at 122 n. 17, 125. Indeed, that was the explicit holding in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80–81 (1960), re-affirming prior cases. It is clear that appellants' complaint satisfies this test if the constitutional issues raised are justiciable controversies. Since we hold, *infra*, that they are, three-judge court jurisdiction exists over all of appellants' claims, including the Supremacy Clause issues.

opinion . . . ." *Ibid.* The District Court also found "compelling reasons to abstain from consideration of the matter in its present posture," *ibid.*—namely, "the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions," *id.*, at 252;[6] the availability of declaratory relief in Michigan courts; the possibility of a complete prohibition on the discharge of sewage in Michigan's navigable waters under federal law;[7] the absence of existing conflict between the Michigan requirements and other state laws;[8] and the pub-

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[6] The Michigan authorities have so far generally refrained from prosecution because adequate land-based pump-out facilities are not yet available to service vessels equipped with sewage storage devices. See *infra*, at 507–508. After oral argument here, the Solicitor General of Michigan informed us "that local officials in Cheboygan County, Michigan, have 'ticketed' a Coast Guard Captain for discharging sewage into the waters of the Great Lakes." However, "to assure the Court that Michigan will not depart from the representations it has made to the Court," the Solicitor General stated that he is "taking immediate steps to quash the charge or have the local court stay its hand until" the decision here.

[7] Michigan has filed an application with the Administrator of the Environmental Protection Agency for a prohibition under 33 U. S. C. § 1163 (f) on the discharge of any sewage, treated or untreated, into all of the State's waters subject to the Water Quality Improvement Act. The Administrator has indicated that any no-discharge regulation issued will not become effective before the effective date of the initial standards promulgated under § 1163 (b) (1). See 36 Fed. Reg. 8739–8740. Appellants argue that the Administrator's authority to issue no-discharge regulations is narrow and could not encompass a complete prohibition on discharge throughout Michigan's navigable waters. Since we find, *infra*, that the possibility of such a prohibition is immaterial to the issues answered here, we need not now decide this question.

[8] Appellants contend in this regard that the laws of other States dealing with the discharge of sewage are critically different from the Michigan statute in various respects. This question, too, we need

lication of proposed federal standards that might be considered by Michigan in the interpretation and enforcement of its statute.[9]

Appellants now urge that their complaint does present an "actual controversy" within the meaning of the Declaratory Judgment Act. 28 U. S. C. § 2201, that is ripe for decision. We agree. The test to be applied, of course, is the familiar one stated in *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941): "Basically, the question in each case is whether . . . there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Compare, *e. g., ibid.*, with, *e. g., Golden* v. *Zwickler*, 394 U. S. 103 (1969). Since, as appellees concede,[10] the Michigan requirements on the discharge of sewage will be preempted when the federal standards become effective, the gist of appellants' grievance is that, according to Michigan authorities, they are required under Michigan law to install sewage storage devices that (1) may become unnecessary once federal standards, authorizing discharge of treated sewage, become applicable or (2) may, in any event, conflict with other state regulations pending the promulgation and effective date of the federal

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not address, since we find, *infra*, that the presence or absence of conflicting state requirements is irrelevant.

[9] See n. 4, *supra*.

[10] Although appellees took an equivocal position on this question in oral argument here, see Tr. of Oral Arg. 36–39, the District Court below expressly found such a concession, see 336 F. Supp., at 255, and appellees repeated the concession in opposing appellants' jurisdictional statement. See Brief in Support of Motion to Dismiss or Affirm 11. In any event, the terms of the Water Quality Improvement Act are clear that pre-emption occurs at least when the initial federal standards promulgated under the Act become effective. See 33 U. S. C. § 1163 (f), quoted in part, *supra*, at 503–504. See also 36 Fed. Reg. 8739–8740.

standards. The immediacy and reality of appellants' concerns do not depend, contrary to what the District Court may have considered, on the probability that federal standards will authorize discharge of treated sewage in Michigan waters or that other States will implement sewage control requirements inconsistent with those of Michigan. They depend instead only on the present effectiveness in fact of the obligation under the Michigan statute to install sewage storage devices. For if appellants are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion. See, *e. g., Southern Pacific Co.* v. *Arizona,* 325 U. S. 761 (1945) (existing burden on interstate commerce justiciable controversy in absence of federal pre-emption or other conflicting state laws).

Regarding the present effectiveness in fact of a statutory obligation, the plurality opinion in *Poe* v. *Ullman,* 367 U. S. 497, 508 (1961), stated that a justiciable controversy does not exist where "compliance with [challenged] statutes is uncoerced by the risk of their enforcement." That, however, is not this case. Although appellees have indicated that they will not prosecute under the Michigan act until adequate land-based pump-out facilities are available to service vessels equipped with sewage storage devices, they *have* sought on the basis of the act and the threat of future enforcement to obtain compliance as soon as possible. The following colloquy that occurred on oral argument here is instructive, Tr. of Oral Arg. 34–35:

> "[Appellees]: . . . We urge that the leadtime for the construction or erection of pump-out facilities is necessary, and there would be no enforcement until pump-out facilities were available.
>
> . . . . . .

"Q. But you're insisting that the carriers get ready to comply and——

"[Appellees]: Yes, sir.

"Q. —because if you wait until pump-out stations are ready to begin [servicing] tanks, then there will be another great delay?

"[Appellees]: Oh, yes, sir.

"Q. So you have a rather concrete confrontation with these carriers now, don't you?

"[Appellees]: Yes, sir, we do. . . ."

Thus, if appellants are to avoid prosecution, they must be prepared, according to Michigan authorities, to retain all sewage on board as soon as pump-out facilities are available, which, in turn, means that they must promptly install sewage storage devices.[11] In this circumstance, compliance is coerced by the threat of enforcement, and the controversy is both immediate and real. See, *e. g.*, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *City of Altus, Oklahoma* v. *Carr*, 255 F. Supp. 828, aff'd *per curiam*, 385 U. S. 35 (1966). See generally, *e. g.*, Comment, 62 Col. L. Rev. 106 (1962).[12]

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[11] Appellees stressed in oral argument here that "[t]he provision for pump-out facilities is no great mechanical accomplishment." Tr. of Oral Arg. 35. This only reinforces the conclusion that appellants must, according to Michigan authorities, quickly get into a position to comply with the Michigan statute.

[12] In coming to a contrary conclusion, the District Court relied heavily on *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U. S. 237 (1952), where we held that declaratory relief was inappropriate in behalf of a carrier seeking a determination that its intrastate transportation constituted interstate commerce. The District Court's reliance on that decision was misplaced. As the Court said in *California Comm'n* v. *United States*, 355 U. S. 534, 538–539 (1958), *Wycoff Co.* was a case "where a carrier sought relief in a federal court against a state commission in order 'to guard against the possibility,' [344 U. S.], at 244, that the Commission would assume jurisdiction." Here, as in *California Comm'n*, the confrontation between the parties

Appellants next argue that the District Court erred in abstaining from deciding the merits of their complaint.[13] We agree that abstention was not proper on the majority of grounds given by the District Court, but hold that abstention was, nevertheless, appropriate for another reason suggested but not fully articulated in its opinion. Abstention is a "judge-made doctrine . . . , first fashioned in 1941 in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, [that] sanctions . . . escape [from immediate decision] only in narrowly limited 'special circumstances,' *Propper* v. *Clark*, 337 U. S. 472, 492," *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967), justifying "the delay and expense to which application of the abstention doctrine inevitably gives rise." *England* v. *Medical Examiners*, 375 U. S. 411, 418 (1964). The majority of circumstances relied on by the District Court in this case do not fall within that category. First, the absence of an immediate threat of prosecution does not argue against reaching the merits of appellants' complaint. In *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Samuels* v. *Mackell*, 401 U. S. 66 (1971), this Court held that, apart from "extraordinary circumstances," a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction ordinarily is appropriate if the conditions for declaratory or injunctive relief are met. See generally

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has already arisen, and "[t]he controversy is present and concrete . . . ." 355 U. S., at 539.

[13] The question of abstention, of course, is entirely separate from the question of granting declaratory or injunctive relief. See generally *Golden* v. *Zwickler*, 394 U. S. 103 (1969); *Zwickler* v. *Koota*, 389 U. S. 241 (1967).

Perez v. *Ledesma*, 401 U. S. 82, 93 (1971) (separate opinion).

Similarly, the availability of declaratory relief in Michigan courts on appellants' federal claims is wholly beside the point. In *Zwickler* v. *Koota*, *supra*, at 248, we said:

> "In thus [establishing jurisdiction for the exercise of] federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ,' *Robb* v. *Connolly*, 111 U. S. 624, 637."

Compare, *e. g.*, *Askew* v. *Hargrave*, 401 U. S. 476 (1971). The possibility that the Administrator of the Environmental Protection Agency may upon Michigan's application forbid the discharge of even treated sewage in state waters and the asserted absence of present conflict between the Michigan requirements and other state laws are equally immaterial. Just as they do not diminish the immediacy and reality of appellants' grievance, they do not call for abstention.

The last factor relied on by the District Court—the publication of proposed federal standards that might be considered by Michigan in the interpretation and enforcement of its statute—does, however, point toward considerations that fall within the "special circumstances" permitting abstention. The paradigm case for abstention arises when the challenged state statute is susceptible of "a construction by the state courts that would avoid or modify the [federal] constitutional question. *Harrison*

v. *NAACP*, 360 U. S. 167. Compare *Baggett* v. *Bullitt*, 377 U. S. 360." *Zwickler* v. *Koota*, *supra*, at 249. More fully, we have explained:

> "Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. . . . The doctrine . . . contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman* v. *Forssenius*, 380 U. S. 528, 534 (1965).

That is precisely the circumstance presented here. The Michigan Watercraft Pollution Control Act of 1970 has not been construed in any Michigan court, and, as appellants themselves suggest in attacking it for vagueness, its terms are far from clear in particulars that go to the foundation of their grievance. It is indeed only an assertion by appellees that the Michigan law proscribes the discharge of even treated sewage in state waters. Section 3 (2) of the Act does state that "[i]t is unlawful to discharge . . . sewage . . . from a recreational, domestic or foreign watercraft used for pleasure or for [commerce] . . . ," and § 4 (2) does require vessels equipped with toilet facilities to have sewage storage devices.[14] Yet § 3 (1) seemingly contemplates the dis-

[14] We assume that these provisions apply to commercial watercraft, though even this is not textually clear. Section 3 (2) in terms applies only to "recreational" vessels, while § 4 (2)—despite the expansive definition of "watercraft" in § 2 (g)—could be similarly limited in light of § 4 (1), which governs only "pleasure or recreational watercraft."

charge of treated sewage by merely prohibiting any person from emitting sewage "which [renders] the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." Moreover, § 11 provides that "[t]o be enforceable, the provision [of the Act] or the rule [presumably promulgated thereunder] shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations." Michigan has thus demonstrated concern that its pollution control requirements be sufficiently flexible to accord with federal law. We do not know, of course, how far Michigan courts will go in interpreting the requirements of the state Watercraft Pollution Control Act in light of the federal Water Quality Improvement Act [15] and the constraints of the United States Constitution.[16] But we are satisfied that authoritative resolution of the ambiguities in the Michigan law is sufficiently likely to avoid or significantly modify the federal questions appellants raise to warrant abstention, particularly in view of the absence of countervailing considerations that we have found compelling in prior decisions. See, *e. g.*, *Harman* v. *Forssenius*, *supra*, at 537; *Baggett* v. *Bullitt*, 377 U. S. 360, 378–379 (1964).

In affirming the decision of the District Court to abstain, we, of course, intimate no view on the merits of appellants' claims. We do, however, vacate the judgment below and remand the case to the District Court

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[15] The Michigan courts may also see fit to interpret the Michigan statute in light of the other Supremacy Clause arguments that have have been made in this case. See n. 1, *supra*.

[16] In the latter regard, see, *e. g.*, *Government Employees* v. *Windsor*, 353 U. S. 364 (1957).

with directions to retain jurisdiction pending institution by appellants of appropriate proceedings in Michigan courts. See *Zwickler* v. *Koota*, 389 U. S., at 244 n. 4.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in the result.

I agree that the complaint presents an actual controversy and that the District Court properly abstained. I therefore concur in the result and join the judgment of the Court.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, dissenting.

The three-judge court below assigned two grounds for dismissing appellants' complaint: (i) there was no justiciable controversy warranting a declaratory judgment; and (ii) this was an appropriate case for abstention by the federal courts until the Michigan Act is construed by its courts. 336 F. Supp. 248 (1971). This Court today affirms the decision of the court below to abstain, despite rejecting virtually all of the premises upon which it was based.

The opinion of this Court concludes, contrary to the holding below, that the controversy is justiciable and that a case for declaratory judgment relief was stated. The Court also concluded that "abstention was not proper on the majority of grounds given by the District Court." Nevertheless, and despite general disagreement with the trial court on the major issues, its decision to abstain is now affirmed.

As it seems to me that the central thrust of the Court's reasoning (with which I agree) requires reversal rather than affirmance of this decision, I file this dissent.

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There is indeed a serious present controversy, involving important federal issues, and posing for the Lake Carriers an immediate choice between the possibility of criminal prosecution or the expenditure of substantial sums of money for antipollution devices and equipment which may not be compatible with the federal regulations which admittedly in due time will be pre-emptive. This presents a classic case for declaratory relief, 28 U. S. C. § 2201, *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). As the opinion of the Court states, "compliance [with the Michigan law] is coerced by the threat of enforcement, and the controversy is both immediate and real."

On the second question, that of abstention, the Court finally finds a ground in the possibility that the state courts of Michigan may construe the statute in a way that will avoid the federal questions. But this is a slender reed on which to rest a judgment. The Michigan statute is not ambiguous on the issue which appellants deem the most critical, namely, whether they are required under Michigan law to install at considerable expense sewage storage devices that may become unnecessary when federal standards become applicable. Section 4 (2) of the Michigan Act is unequivocal, providing that vessels may not use marine toilets in Michigan waters unless equipped with:

> "(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.
>
> "(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution."

Section 3 (2) flatly prohibits the discharge of sewage into Michigan waters.[1] These two sections unmistakably express Michigan's decision in favor of retention or incineration of sewage aboard ships rather than its treatment and discharge into state waters.[2]

The majority opinion of the Court views § 3 (1) as affording some flexibility and room for interpretation.[3] Yet, it seems clear from the context of the entire statute that § 3 (1) is a general statement of environmental purpose applicable to all persons (as defined), expressing the overall statutory objective of prohibiting pollution of Michigan waters. This section can hardly be construed to contradict the specific provisions of § 4 (2) which relate to the owners and operators of foreign and domestic vessels engaged in commerce upon Michigan waters. Indeed, the Michigan State Attorney General, the Department of Natural Resources and its Director, and the Water Resources Commission and its Executive Secretary *all* read the statute as "designed to prevent appellants and others in their class from pouring their

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[1] "It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state." State of Michigan Act 167, Public Acts of 1970, § 3 (2).

[2] By defining "sewage" in § 2 (d) of the Act to mean all human body wastes, *treated or untreated* (emphasis supplied), Michigan further precludes any possibility that discharge of treated sewage would be permitted.

[3] "A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." State of Michigan Act 167, Public Acts of 1970, § 3 (1).

filth, *no matter how well treated,* into Michigan waters of the Great Lakes." (Emphasis supplied.) Brief for Appellees 16.[4]

Appellants have raised federal questions (as to the merits of which no opinion is expressed) which are important to the public as well as to the litigants. They have sought relief in a federal court, relying on "the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler* v. *Koota,* 389 U. S. 241, 248 (1967). It seems probable that these federal questions will remain in their present posture, whatever interpretation may be placed upon the Michigan statute by a state court. The questions of congressional intent to preempt the regulation of marine sanitation devices and of multiple state regulatory schemes which may unduly burden interstate commerce are, in large measure, independent of the particular construction given the Michigan Act.

We have spoken previously of "the delay and expense to which application of the abstention doctrine inevitably gives rise." *England* v. *Medical Examiners,* 375 U. S. 411, 418 (1964). The relegation to state courts of this important litigation, involving major federal

[4] Nor do I agree with the majority that § 11 of the Michigan Act affords a reason for abstention. Section 11 provides that any provision or rule under the Act "shall be of such flexibility that a watercraft owner . . . is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations." This language appears to relate only to federal safety, marine, and navigation laws and regulations. It does not refer to the Federal Water Pollution Control Act or to federal laws relating to pollution. It is difficult to believe that this single sentence in § 11 of the Michigan Act could be construed to nullify the other affirmative provisions prohibiting altogether the discharge of sewage.

issues and affecting every ship operating in Michigan waters, is likely to result in serious delay, substantial expense to the parties (including the State), and a prolonging of the uncertainty which now exists.

I would reverse the judgment below and direct the District Court to proceed on the merits.

DEEPSOUTH PACKING CO., INC. *v.* LAITRAM CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-315. Argued April 11, 1972—Decided May 30, 1972

Petitioner is not foreclosed by 35 U. S. C. § 271 (a), which proscribes the unauthorized making of any patented invention within the United States, from making the parts of shrimp deveining machines (for which respondent was adjudged to have valid combination patents) to sell to foreign buyers for assembly by the buyers for use abroad. The word "makes" as used in § 271 (a) does not extend to the manufacture of the constituent parts of a combination machine, and the unassembled export of the elements of an invention does not infringe the patent. *Radio Corp. of America* v. *Andrea*, 79 F. 2d 626. Pp. 519-532.

443 F. 2d 936, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 532.

Harold J. Birch argued the cause for petitioner. With him on the briefs were *C. Emmett Pugh* and *William W. Beckett.*

Guy W. Shoup argued the cause and filed a brief for respondent.

Edward S. Irons and *Mary Helen Sears* filed a brief as *amici curiae* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

The United States District Court for the Eastern District of Louisiana has written:

> "Shrimp, whether boiled, broiled, barbecued or fried, are a gustatory delight, but they did not evolve

> to satisfy man's palate. Like other crustaceans, they wear their skeletons outside their bodies in order to shield their savory pink and white flesh against predators, including man. They also carry their intestines, commonly called veins, in bags (or sand bags) that run the length of their bodies. For shrimp to be edible, it is necessary to remove their shells. In addition, if the vein is removed, shrimp become more pleasing to the fastidious as well as more palatable." [1]

Such "gustatory" observations are rare even in those piscatorially favored federal courts blissfully situated on the Nation's Gulf Coast, but they are properly recited in this case. Petitioner and respondent both hold patents on machines that devein shrimp more cheaply and efficiently than competing machinery or hand labor can do the job. Extensive litigation below has established that respondent, the Laitram Corp., has the superior claim and that the distribution and use of petitioner Deepsouth's machinery in this country should be enjoined to prevent infringement of Laitram's patents. *Laitram Corp.* v. *Deepsouth Packing Co.*, 443 F. 2d 928 (CA5 1971). We granted certiorari, 404 U. S. 1037 (1972), to consider a related question: Is Deepsouth, barred from the American market by Laitram's patents, also foreclosed by the patent laws from exporting its deveiners, in less than fully assembled form, for use abroad?

I

A rudimentary understanding of the patents in dispute is a prerequisite to comprehending the legal issue presented. The District Court determined that the Laitram Corp. held two valid patents for machin-

[1] *Laitram Corp.* v. *Deepsouth Packing Co.*, 301 F. Supp. 1037, 1040 (1969).

ery used in the process of deveining shrimp. One, granted in 1954,[2] accorded Laitram rights over a "slitter" which exposed the veins of shrimp by using water pressure and gravity to force the shrimp down an inclined trough studded with razor blades. As the shrimp descend through the trough their backs are slit by the blades or other knife-like objects arranged in a zig-zag pattern. The second patent, granted in 1958, covers a "tumbler," "a device to mechanically remove substantially all veins from shrimp whose backs have previously been slit," App. 127, by the machines described in the 1954 patent. This invention uses streams of water to carry slit shrimp into and then out of a revolving drum fabricated from commercial sheet metal. As shrimp pass through the drum the hooked "lips" of the punched metal, "projecting at an acute angle from the supporting member and having a smooth rounded free edge for engaging beneath the vein of a shrimp and for wedging the vein between the lip and the supporting member," App. 131, engage the veins and remove them.

Both the slitter and the tumbler are combination patents; that is,

> "[n]one of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. And this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other

[2] This patent expired shortly before argument in this court and is therefore not relevant to Laitram's claim for injunctive relief. It is described, however, because Laitram claims damages for Deepsouth's asserted past exportation of the parts of this machine.

> parts of the [machine] in the manner therein described, is stated to be the improvement, and is the thing patented." *Prouty* v. *Ruggles,* 16 Pet. 336, 341 (1842).

The slitter's elements as recited in Laitram's patent claim were: an inclined trough, a "knife" (actually, knives) positioned in the trough, and a means (water sprayed from jets) to move the shrimp down the trough. The tumbler's elements include a "lip," a "support member," and a "means" (water thrust from jets). As is usual in combination patents, none of the elements in either of these patents were themselves patentable at the time of the patent, nor are they now. The means in both inventions, moving water, was and is, of course, commonplace. (It is not suggested that Deepsouth infringed Laitram's patents by its use of water jets.) The cutting instruments and inclined troughs used in slitters were and are commodities available for general use. The structure of the lip and support member in the tumbler were hardly novel: Laitram concedes that the inventors merely adapted punched metal sheets ordered from a commercial catalog in order to perfect their invention. The patents were warranted not by the novelty of their elements but by the novelty of the combination they represented. Invention was recognized because Laitram's assignors [3] combined ordinary elements in an extraordinary way—a novel union of old means was designed to achieve new ends.[4] Thus,

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[3] The machines were developed by two brothers who are now president and vice-president of the Laitram Corp. The patents are in their names, but have been assigned to the corporation.

[4] The District Court wrote:

"Defendant urges that the [1958] patent is invalid as aggregative, anticipated by the prior art, obvious, described in functional language, overbroad, and indefinite. While it is clear that the elements in

for both inventions "the whole in some way exceed[ed] the sum of its parts." *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, 152 (1950).

II

The lower court's decision that Laitram held valid combination patents entitled the corporation to the privileges bestowed by 35 U. S. C. § 154, the keystone provision of the patent code. "[F]or the term of seventeen years" from the date of the patent, Laitram had "the right to exclude others from making, using, or selling the invention throughout the United States . . . ." The § 154 right in turn provides the basis for affording the patentee an injunction against direct, induced, and contributory infringement, 35 U. S. C. § 283, or an award of damages when such infringement has already occurred, 35 U. S. C. § 284. Infringement is defined by 35 U. S. C. § 271 in terms that follow those of § 154:

> "(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, [directly] infringes the patent.
>
> "(b) Whoever actively induces infringement of a patent shall be liable as an infringer.
>
> "(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringe-

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the . . . patent, especially the punch lip material, had been available for a considerable period of time, when combined they co-act in such a manner to perform a new function and produce new results." 301 F. Supp., at 1063.

> ment of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer."

As a result of these provisions the judgment of Laitram's patent superiority forecloses Deepsouth and its customers from any future use (other than a use approved by Laitram or occurring after the Laitram patent has expired) of its deveiners "throughout the United States." The patent provisions taken in conjunction with the judgment below also entitle Laitram to the injunction it has received prohibiting Deepsouth from continuing to "make" or, once made, to "sell" deveiners "throughout the United States." Further, Laitram may recover damages for any past unauthorized use, sale, or making "throughout the United States." This much is not disputed.

But Deepsouth argues that it is not liable for every type of past sale and that a portion of its future business is salvageable. Section 154 and related provisions obviously are intended to grant a patentee a monopoly only over the United States market; they are not intended to grant a patentee the bonus of a favored position as a flagship company free of American competition in international commerce. Deepsouth, itself barred from using its deveining machines, or from inducing others to use them "throughout the United States," barred also from making and selling the machines in the United States, seeks to make the parts of deveining machines, to sell them to foreign buyers, and to have the buyers assemble the parts and use the machines abroad.[5] Ac-

[5] Deepsouth is entirely straightforward in indicating that its course of conduct is motivated by a desire to avoid patent infringement. Its president wrote a Brazilian customer:

"We are handicapped by a decision against us in the United States. This was a very technical decision and we can manufacture the entire

cordingly, Deepsouth seeks judicial approval, expressed through a modification or interpretation of the injunction against it, for continuing its practice of shipping deveining equipment to foreign customers in three separate boxes, each containing only parts of the 1¾-ton machines, yet the whole assemblable in less than one hour.[6] The company contends that by this means both the "making" and the "use" of the machines occur abroad and Laitram's lawful monopoly over the making and use of the machines throughout the United States is not infringed.

Laitram counters that this course of conduct is based upon a hypertechnical reading of the patent code that, if tolerated, will deprive it of its right to the fruits of the inventive genius of its assignors. "The right to make can scarcely be made plainer by definition . . . ," *Bauer* v. *O'Donnell*, 229 U. S. 1, 10 (1913). Deepsouth in all respects save final assembly of the parts "makes" the invention. It does so with the intent of having the foreign user effect the combination without Laitram's permission. Deepsouth sells these components as though they were the machines themselves; the act of assembly is regarded, indeed advertised, as of no importance.

The District Court, faced with this dispute, noted that three prior circuit courts had considered the meaning of "making" in this context and that all three had resolved the question favorably to Deepsouth's posi-

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machine without any complication in the United States, with the exception that there are two parts that must not be assembled in the United States, but assembled after the machine arrives in Brazil."

Quoted in *Laitram Corp.* v. *Deepsouth Packing Co.*, 443 F. 2d 928, 938 (CA5 1971).

[6] As shipped, Deepsouth's tumbler contains a deveining belt different from Laitram's support member and lip. But the Laitram elements are included in a separate box and the Deepsouth tumbler is made to accommodate the Laitram elements. The record shows that many customers will use the machine with the Laitram parts.

tion. See *Hewitt-Robins, Inc.* v. *Link-Belt Co.*, 371 F. 2d 225 (CA7 1966); *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 235 F. 2d 224 (CA3 1956); and *Radio Corp. of America* v. *Andrea*, 79 F. 2d 626 (CA2 1935). The District Court held that its injunction should not be read as prohibiting export of the elements of a combination patent even when those elements could and predictably would be combined to form the whole.

> "It may be urged that . . . [this] result is not logical . . . . But it is founded on twin notions that underlie the patent laws. One is that a combination patent protects only the combination. The other is that monopolies—even those conferred by patents—are not viewed with favor. These are logic enough." 310 F. Supp. 926, 929 (1970).

The Court of Appeals for the Fifth Circuit reversed, thus departing from the established rules of the Second, Third, and Seventh Circuits. In the Fifth Circuit panel's opinion, those courts that previously considered the question "worked themselves into . . . a conceptual box" by adopting "an artificial, technical construction" of the patent laws, a construction, moreover, which in the opinion of the panel, "[subverted] the Constitutional scheme of promoting 'the Progress of Science and useful Arts' " by allowing an intrusion on a patentee's rights, 443 F. 2d, at 938–939, citing U. S. Const., Art. I, § 8.

III

We disagree with the Court of Appeals for the Fifth Circuit.[7] Under the common law the inventor had no

[7] For simplicity's sake, we, like the lower courts, will discuss only Deepsouth's claim as to permissible future conduct. It is obvious, however, that what we say as to the scope of the injunction in Laitram's favor applies also to the calculation of damages that Laitram may recover.

right to exclude others from making and using his invention. If Laitram has a right to suppress Deepsouth's export trade it must be derived from its patent grant, and thus from the patent statute.[8] We find that 35 U. S. C. § 271, the provision of the patent laws on which Laitram relies, does not support its claim.

Certainly if Deepsouth's conduct were intended to lead to use of patented deveiners inside the United States its production and sales activity would be subject to injunction as an induced or contributory infringement. But it is established that there can be no contributory infringement without the fact or intention of a direct infringement. "In a word, if there is no [direct] infringement of a patent there can be no contributory infringer." *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 677 (1944) (Frankfurter, J., dissenting on other grounds). *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336, 341–342 (1961), succinctly articulates the law:

> "It is plain that § 271 (c)—a part of the Patent Code enacted in 1952—made no change in the fundamental precept that there can be no contributory infringement in the absence of a direct infringement. That section defines contributory infringement in terms of direct infringement—namely the sale of a component of a patented combination or machine for use 'in an infringement of such patent.'"

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[8] "But the right of property which a patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions; and this court [has] always held that an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the acts of Congress; and that his rights are to be regulated and measured by these laws, and cannot go beyond them." *Brown* v. *Duchesne*, 19 How. 183, 195 (1857).

The statute makes it clear that it is not an infringement to make or use a patented product outside of the United States. 35 U. S. C. § 271. See also *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641, 650 (1915), *Brown* v. *Duchesne*, 19 How. 183 (1857). Thus, in order to secure the injunction it seeks, Laitram must show a § 271 (a) direct infringement by Deepsouth in the United States, that is, that Deepsouth "makes," "uses," or "sells" the patented product within the bounds of this country.

Laitram does not suggest that Deepsouth "uses" the machines. Its argument that Deepsouth sells the machines—based primarily on Deepsouth's sales rhetoric and related indicia such as price [9]—cannot carry the day unless it can be shown that Deepsouth is selling the "patented invention." The sales question thus resolves itself into the question of manufacture: did Deepsouth "make" (and then sell) something cognizable under the patent law as the patented invention, or did it "make" (and then sell) something that fell short of infringement?

The Court of Appeals, believing that the word "makes" should be accorded "a construction in keeping with the ordinary meaning of that term," 443 F. 2d, at 938, held against Deepsouth on the theory that "makes" "means what it ordinarily connotes—the substantial manufacture of the constituent parts of the machine." *Id.*, at 939. Passing the question of whether this definition more closely corresponds to the ordinary meaning of the term than that offered by Judge Swan in *Andrea* 35 years earlier (something is made when it reaches the state of

[9] Deepsouth sold the less than completely assembled machine for the same price as it had sold fully assembled machines. Its advertisements, correspondence, and invoices frequently referred to a "machine," rather than to a kit or unassembled parts. See Brief for Respondent 8–11.

final "operable" assembly), we find the Fifth Circuit's definition unacceptable because it collides head on with a line of decisions so firmly embedded in our patent law as to be unassailable absent a congressional recasting of the statute.

We cannot endorse the view that the "substantial manufacture of the constituent parts of [a] machine" constitutes direct infringement when we have so often held that a combination patent protects only against the operable assembly of the whole and not the manufacture of its parts. "For as we pointed out in *Mercoid* v. *Mid-Continent Investment Co.*, [320 U. S. 661, 676] a patent on a combination is a patent on the assembled or functioning whole, not on the separate parts." *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680, 684 (1944). See also *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 301:

> "A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But whether new or old, the combination is a means—an invention—distinct from them." *Id.*, at 318.
>
> . . . . .
>
> "[O]ne element is not the combination. Indeed, all of the elements are not. To be that—to be identical with the invention of the combination—they must be united by the same operative law." *Id.*, at 320.

And see *Brown* v. *Guild*, 23 Wall. 181 (1874). In sum,

> "[i]f anything is settled in the patent law, it is that the combination patent covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant." *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S., at 344.

It was this basic tenet of the patent system that led Judge Swan to hold in the leading case, *Radio Corp. of America* v. *Andrea*, 79 F. 2d 626 (1935), that unassembled export of the elements of an invention did not infringe the patent.

> "[The] relationship is the essence of the patent.
>
> ". . . No wrong is done the patentee until the combination is formed. His monopoly does not cover the manufacture or sale of separate elements capable of being, but never actually, associated to form the invention. Only when such association is made is there a direct infringement of his monopoly, and not even then if it is done outside the territory for which the monopoly was granted." *Id.*, at 628.

See also *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 235 F. 2d, at 230 ("We are in full accord with the rule thus laid down in the Andrea case and we think that the master and the district court were right in applying it here"); *Hewitt-Robins, Inc.* v. *Link Belt Co.*, 371 F. 2d, at 229 (to the same effect).

We reaffirm this conclusion today.

IV

It is said that this conclusion is derived from too narrow and technical an interpretation of the statute, and that this Court should focus on the constitutional mandate

> "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ," Art. I, § 8,

and construe the statute in a manner that would, allegedly, better reflect the policy of the Framers.

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We cannot accept this argument. The direction of Art. I is that *Congress* shall have the power to promote the progress of science and the useful arts. When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress. We are here construing the provisions of a statute passed in 1952. The prevailing law in this and other courts as to what is necessary to show a patentable invention when a combination of old elements is claimed was clearly evident from the cases when the Act was passed; and at that time *Andrea*, representing a specific application of the law of infringement with respect to the export of elements of a combination patent, was 17 years old. When Congress drafted § 271, it gave no indication that it desired to change either the law of combination patents as relevant here or the ruling of *Andrea*.[10] Nor has it on any more recent occasion indicated that it wanted the patent privilege to run farther than it was understood to run for 35 years prior to the action of the Court of Appeals for the Fifth Circuit.

Moreover, we must consider petitioner's claim in light of this Nation's historical antipathy to monopoly [11] and of repeated congressional efforts to preserve and foster competition. As this Court recently said without dissent:

> "[I]n rewarding useful invention, the 'rights and welfare of the community must be fairly dealt

[10] When § 271 was drafted and submitted to the Senate in 1952, Senator Saltonstall asked: "Does the bill change the law in any way or only codify the present patent laws?" Senator McCarran, Chairman of the Judiciary Committee, responded: "It codifies the present patent laws." 98 Cong. Rec. 9323.

[11] See the discussion in *Graham* v. *John Deere Co.*, 383 U. S. 1, 7 *et seq.* (1966).

> with and effectually guarded.' *Kendall* v. *Winsor*, 21 How. 322, 329 (1859). To that end the prerequisites to obtaining a patent are strictly observed, and when the patent has issued the limitations on its exercise are equally strictly enforced." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230 (1964).

It follows that we should not expand patent rights by overruling or modifying our prior cases construing the patent statutes, unless the argument for expansion of privilege is based on more than mere inference from ambiguous statutory language. We would require a clear and certain signal from Congress before approving the position of a litigant who, as respondent here, argues that the beachhead of privilege is wider, and the area of public use narrower, than courts had previously thought. No such signal legitimizes respondent's position in this litigation.

In conclusion, we note that what is at stake here is the right of American companies to compete with an American patent holder in foreign markets. Our patent system makes no claim to extraterritorial effect; "these acts of Congress do not, and were not intended to, operate beyond the limits of the United States," *Brown* v. *Duchesne*, 19 How., at 195; and we correspondingly reject the claims of others to such control over our markets. Cf. *Boesch* v. *Graff*, 133 U. S. 697, 703 (1890). To the degree that the inventor needs protection in markets other than those of this country, the wording of 35 U. S. C. §§ 154 and 271 reveals a congressional intent to have him seek it abroad through patents secured in countries where his goods are being used. Respondent holds foreign patents; it does not adequately explain why it does not avail itself of them.

V

In sum: the case and statutory law resolves this case against the respondent. When so many courts have so often held what appears so evident—a combination patent can be infringed only by combination—we are not prepared to break the mold and begin anew. And were the matter not so resolved, we would still insist on a clear congressional indication of intent to extend the patent privilege before we could recognize the monopoly here claimed. Such an indication is lacking. Accordingly, the judgment of the Court of Appeals for the Fifth Circuit is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

Because our grant of certiorari was limited, 404 U. S. 1037 (1972), the customarily presented issues of patent validity and infringement are not before us in this case. I necessarily accept, therefore, the conclusion that the Laitram patents are valid and that the Deepsouth deveining machine, when manufactured and assembled in the United States, is an infringement. The Court so concedes. The Court, however, denies Laitram patent law protection against Deepsouth's manufacture and assembly when the mere assembly is effected abroad. It does so on the theory that there then is no "making" of the patented invention in the United States even though every part is made here and Deepsouth ships all the parts in response to an order from abroad.

With all respect, this seems to me to be too narrow a reading of 35 U. S. C. §§ 154 and 271 (a). In addition, the result is unduly to reward the artful com-

petitor who uses another's invention in its entirety and who seeks to profit thereby. Deepsouth may be admissive and candid or, as the Court describes it, *ante,* at 523 n. 5, "straightforward," in its "sales rhetoric," *ante,* at 527, but for me that rhetoric reveals the very iniquitous and evasive nature of Deepsouth's operations. I do not see how one can escape the conclusion that the Deepsouth machine was *made* in the United States, within the meaning of the protective language of §§ 154 and 271 (a). The situation, perhaps, would be different were parts, or even only one vital part, manufactured abroad. Here everything was accomplished in this country except putting the pieces together as directed (an operation that, as Deepsouth represented to its Brazilian prospect, would take "less than one hour"), all much as the fond father does with his little daughter's doll house on Christmas Eve. To say that such assembly, accomplished abroad, is not the prohibited combination and that it avoids the restrictions of our patent law, is a bit too much for me. The Court has opened the way to deny the holder of the United States combination patent the benefits of his invention with respect to sales to foreign purchasers.

I also suspect the Court substantially overstates when it describes *Radio Corp. of America* v. *Andrea,* 79 F. 2d 626 (CA2 1935), as a "leading case," *ante,* at 529, and when it imputes to Congress, in drafting the 1952 statute, an awareness of *Andrea*'s "prevailing law," *ante,* at 530. *Andrea* was seriously undermined only two years after its promulgation, when the Court of Appeals modified its decree on a second review. *Radio Corp. of America* v. *Andrea,* 90 F. 2d 612 (CA2 1937). Its author, Judge Swan himself, dissenting in part from the 1937 decision, somewhat ruefully allowed that his court was overruling the earlier decision. *Id.,* at 615. I therefore would follow the Fifth Circuit's opinion in the

present case, 443 F. 2d 936 (1971), and would reject the reasoning in the older and weakened *Andrea* opinion and in the Third and Seventh Circuit opinions that merely follow it.

By a process of only the most rigid construction, the Court, by its decision today, fulfills what Judge Clark, in his able opinion for the Fifth Circuit, distressingly forecast:

> "To hold otherwise [as the Court does today] would subvert the Constitutional scheme of promoting 'the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.' U. S. Const., art. I § 8 Cl. 8. It would allow an infringer to set up shop next door to a patent-protected inventor whose product enjoys a substantial foreign market and deprive him of this valuable business. If this Constitutional protection is to be fully effectuated, it must extend to an infringer who manufactures in the United States and then captures the foreign markets from the patentee. The Constitutional mandate cannot be limited to just manufacturing and selling within the United States. The infringer would then be allowed to reap the fruits of the American economy—technology, labor, materials, etc.—but would not be subject to the responsibilities of the American patent laws. We cannot permit an infringer to enjoy these benefits and then be allowed to strip away a portion of the patentee's protection." 443 F. 2d, at 939.

I share the Fifth Circuit's concern and I therefore dissent.

Syllabus

JEFFERSON ET AL. *v.* HACKNEY, COMMISSIONER OF PUBLIC WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 70–5064. Argued February 22, 1972—Decided May 30, 1972

Appellants, recipients of Aid to Families With Dependent Children (AFDC), challenge the system whereby Texas, in order to allocate its fixed pool of welfare money among persons with acknowledged need, applies a percentage reduction factor to arrive at a reduced standard of need, the factor being lower for AFDC than for other categorical assistance programs. Appellants assert that the State's method of applying this factor to recipients with outside income contravenes § 402 (a)(23) of the Social Security Act, which required adjustment, by July 1, 1969, of "amounts used . . . to determine the needs of individuals" to reflect increases in living costs, because this method does not increase the welfare rolls to the same extent as would an alternative procedure used by some other States. They also make an equal protection claim on the grounds that the distinction between the aid programs is not rational and that the Texas system racially discriminates against the proportionately larger number of minority groups in AFDC than in the other programs. *Held:*

1. The Texas scheme does not contravene § 402 (a)(23) of the Social Security Act, which does not require use of a computation procedure that maximizes individual eligibility for subsidiary benefits. Pp. 539–545.

2. The challenged system does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 545–551.

(a) The fact that there are more members of minority groups in the AFDC program than in other categories does not indicate racial discrimination, absent any proof of racial motivation in the Texas scheme. There was no such proof here. Pp. 547–549.

(b) Texas' decision to provide somewhat lower welfare benefits for AFDC recipients than for the aged and infirm who are in other categories is not invidious or irrational, and there is no constitutional or statutory requirement that relief categories be treated exactly alike. Pp. 549–551.

Affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a statement joining in Part III of the Court's opinion, *post*, p. 551. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 551. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Part I of which STEWART, J., joined, *post*, p. 558.

Steven J. Cole argued the cause for appellants. With him on the briefs were *Henry A. Freedman, Ed J. Polk, Edward V. Sparer,* and *Carl Rachlin.*

Pat Bailey, Assistant Attorney General of Texas, argued the cause for appellees. With him on the brief were *Crawford C. Martin,* Attorney General, *Nola White,* First Assistant Attorney General, *Alfred Walker,* Executive Assistant Attorney General, and *J. C. Davis,* Assistant Attorney General.

Evelle J. Younger, Attorney General, and *Elizabeth Palmer* and *Jerold A. Prod,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

Solicitor General Griswold, by invitation of the Court, filed a memorandum for the United States as *amicus curiae.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellants in this case challenge certain computation procedures that the State of Texas uses in its federally assisted welfare program. Believing that neither the Constitution nor the federal welfare statute prohibits the State from adopting these policies, we affirm the judgment of the three-judge court below upholding the state procedures.

I

Appellants are Texas recipients of Aid to Families With Dependent Children (AFDC). They brought two class

actions, which were consolidated in the United States District Court for the Northern District of Texas, seeking injunctive and declaratory relief against state welfare officials. A three-judge court was convened pursuant to 28 U. S. C. § 2281.

The Texas State Constitution provides a ceiling on the amount the State can spend on welfare assistance grants.[1] In order to allocate this fixed pool of welfare money among the numerous individuals with acknowledged need, the State has adopted a system of percentage grants. Under this system, the State first computes the monetary needs of individuals eligible for relief under each of the federally aided categorical assistance programs.[2] Then, since the constitutional ceiling on welfare is insufficient to bring each recipient up to this full standard of need, the State applies a percentage reduction factor [3] in order to arrive at a reduced standard of need in each category that the State can guarantee.

Appellants challenge the constitutionality of applying a lower percentage reduction factor to AFDC than to

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[1] Originally, the Texas Constitution prohibited all welfare programs. Section 51 of Art. III of the Constitution provided that the legislature "shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever . . . ." However, beginning in 1933, exceptions to this rule were added to the state constitution in § 51–a, which now allows participation in the federal welfare programs, but limits state financing to the sum of $80,000,000. The legislature cannot exceed this welfare budget without a state constitutional amendment.

[2] Old Age Assistance (OAA), 42 U. S. C. § 301 *et seq.*; Aid to Families with Dependent Children (AFDC), 42 U. S. C. § 601 *et seq.*; Aid to the Blind (AB), 42 U. S. C. § 1201 *et seq.*; Aid for the Permanently and Totally Disabled (APTD), 42 U. S. C. § 1351 *et seq.*

[3] At the present time these factors are: OAA—100%; AB—95%; APTD—95%; and AFDC—75%. At the time this suit was instituted the AFDC percentage was 50%, but it was raised to 75% following a recent amendment of § 51–a. See n. 1, *supra*.

the other categorical assistance programs. They claim a violation of equal protection because the proportion of AFDC recipients who are black or Mexican-American is higher than the proportion of the aged, blind, or disabled welfare recipients who fall within these minority groups. Appellants claim that the distinction between the programs is not rationally related to the purposes of the Social Security Act, and violates the Fourteenth Amendment for that reason as well. In their original complaint, appellants also argued that any percentage-reduction system violated § 402 (a)(23) of the Social Security Act of 1935, as amended, 81 Stat. 898, 42 U. S. C. § 602 (a)(23), which required each State to make certain cost-of-living adjustments to its standard of need.

The three-judge court rejected appellants' constitutional arguments, finding that the Texas system is neither racially discriminatory nor unconstitutionally arbitrary. The court did, however, accept the statutory claim that Texas' percentage reductions in the AFDC program violate the congressional command of § 402 (a)(23). 304 F. Supp. 1332 (ND Tex. 1969).

Subsequent to that judgment, this Court decided *Rosado* v. *Wyman*, 397 U. S. 397 (1970). *Rosado* held that, although § 402 (a)(23) required States to make cost-of-living adjustments in their standard-of-need calculations, it did not prohibit use of percentage-reduction systems that limited the amount of welfare assistance actually paid. 397 U. S., at 413. This Court then vacated and remanded the first *Jefferson* judgment for further proceedings consistent with *Rosado*. 397 U. S. 821 (1970).

On remand, the District Court entered a new judgment, denying all relief. Then, in a motion to amend the judgment, appellants raised a new statutory claim. They argued for the first time that although a percentage-reduction system may be consistent with the statute, the

specific procedures that Texas uses for computing that reduction violate the congressional enactment. The District Court rejected this argument and denied without opinion appellants' motion to amend the judgment. This appeal under 28 U. S. C. § 1253 then followed, and we noted probable jurisdiction. 404 U. S. 820 (1971).

II

Appellants' statutory argument relates to the method that the State uses to compute the percentage reduction when the recipient also has some outside income. Texas, like many other States,[4] first applies the percentage-reduction factor to the recipient's standard of need, thus arriving at a reduced standard of need that the State can guarantee for each recipient within the present budgetary restraints. After computing this reduced standard of need, the State then subtracts any nonexempt [5] income in order to arrive at the level of benefits that the recipient needs in order to reach his reduced standard of need. This is the amount of welfare the recipient is given.

Under an alternative system used by other States, the order of computation is reversed. First, the outside income is subtracted from the standard of need, in order to determine the recipient's "unmet need." Then, the percentage-reduction factor is applied to the unmet need, in order to determine the welfare benefits payable.

The two systems of accounting for outside income yield different results.[6] Under the Texas system all

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[4] Nineteen of the 26 States that use a percentage-reduction system follow the Texas procedure of accounting for outside income. See Memorandum for the United States as *Amicus Curiae* 8, 15–16.

[5] A certain portion of earned income must be exempted as a work incentive. See 42 U. S. C. § 602 (a) (8).

[6] Assuming two identical families, each with a standard of need

welfare recipients with the same needs have the same amount of money available each month, whether or not they have outside income. Since the outside income is applied dollar for dollar to the reduced standard of need, which the welfare department would otherwise pay in full, it does not result in a net improvement in the financial position of the recipient. Under the alternative system, on the other hand, any welfare recipient who also has outside income is in a better financial position because of it. The reason is that the percentage-reduction factor there is applied to the "unmet need," after the income has been subtracted. Thus, in effect, the income-earning recipient is able to "keep" all his income, while he receives only a percentage of the remainder of his standard of need.[7]

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of $200, and outside, nonexempt income of $100, the two systems would produce these results:

Texas System	*Alternative System*
$ 200 (need)	$ 200 (need)
× .75 (% reduction factor)	−100 (outside income)
$ 150 (reduced need)	$ 100 (unmet need)
−100 (outside income)	× .75 (% reduction factor)
$ 50 (benefits payable)	$ 75 (benefits payable)

[7] Assuming two families with identical standards of need, but only one with outside income, the alternative system leaves more money in the hands of the family with outside income:

Outside Income	*No Outside Income*
$ 200 (need)	$ 200 (need)
−100 (outside income)	− 0 (outside income)
$ 100 (unmet need)	$ 200 (unmet need)
× .75 (% reduction factor)	× .75 (% reduction factor)
$ 75 (benefits payable)	$ 150 (benefits payable)
TOTAL INCOME (outside income plus benefits payable) = $175	TOTAL INCOME (outside income plus benefits payable) = $150

Each of the two systems has certain advantages. Appellants note that under the alternative system there is a financial incentive for welfare recipients to obtain outside income. The Texas computation method eliminates any such financial incentive, so long as the outside income remains less than the recipient's reduced standard of need.[8] However, since Texas' pool of available welfare funds is fixed, any increase in benefits paid to the working poor would have to be offset by reductions elsewhere. Thus, if Texas were to switch to the alternative system of recognizing outside income, it would be forced to lower its percentage-reduction factor, in order to keep down its welfare budget. Lowering the percentage would result in less money for those who need the welfare benefits the most—those with no outside income—and the State has been unwilling to do this.

Striking the proper balance between these competing policy considerations is, of course, not the function of this Court. "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King* v. *Smith*, 392 U. S. 309, 318–319 (1968) (footnotes omitted).[9] So long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act, appellants' policy arguments must be addressed to a different forum.

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[8] Under the Texas system, once the income rises above the reduced standard of need the individual no longer receives any cash assistance. He then would have a financial incentive, since his income would be rising above the maximum he could expect from the welfare system.

[9] For a general review of the statutory scheme, see *Rosado* v. *Wyman*, 397 U. S. 397, 407–412 (1970).

Appellants assert, however, that the Texas computation procedures are contrary to § 402 (a)(23):

> "(a) A State plan for aid and services to needy families with children must
>
> . . . . .
>
> "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

Recognizing that this statutory language, by its terms, hardly provides much support for their theory, appellants seek to rely on what they perceive to have been the broad congressional purpose in enacting the provision.

In *Rosado* v. *Wyman, supra,* the Court reviewed the history of this section and rejected the argument that it had worked any radical shift in the AFDC program. *Id.,* at 414 and n. 17. AFDC has long been referred to as a "scheme of cooperative federalism," *King* v. *Smith,* 392 U. S., at 316, and the *Rosado* Court dismissed as "adventuresome" any interpretation of § 402 (a)(23) that would deprive the States of their traditional discretion to set the levels of payments. 397 U. S., at 414–415 and n. 17. Instead, the statute was meant to require the States to make cost-of-living adjustments to their standards of need, thereby serving "two broad purposes":

> "First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis." *Id.,* at 412–413.

Texas has complied with these two requirements. Effective May 1, 1969, the standard of need for AFDC recipients was raised 11% to reflect the rise in the cost of living, and the State shifted from a maximum-grant system to its present percentage-reduction system. In this way, the State has fairly recognized and exposed the precise level of unmet need, and by using a percentage-reduction system it has attempted to apportion the State's limited benefits more equitably.

Although Texas has thus responded to the "two broad purposes" of § 402 (a)(23), appellants argue that Congress also intended that statute to increase the total number of recipients of AFDC, so that more people would qualify for the subsidiary benefits that are dependent on receipt of AFDC cash assistance.[10] The Texas computation procedures are thought objectionable since they do not increase the welfare rolls to quite the same extent as would the alternative method of recognizing outside income.

We do not agree that Congress intended § 402 (a)(23) to invalidate any state computation procedures that do not absolutely maximize individual eligibility for subsidiary benefits. The cost-of-living increase that Congress mandated would, of course, generally tend to increase eligibility,[11] but there is nothing in the legislative history

[10] Certain care-and-training provisions of the Social Security Act are available only to those who receive money payments under the categorical assistance programs. See 42 U. S. C. §§ 602 (a)(14), (15); 42 U. S. C. §§ 602 (a)(19), 632; 42 U. S. C. § 1396a (a)(10). Under the Texas computation procedures, those whose income exceeds their reduced standard of need receive no cash benefits and thus do not qualify for these subsidiary benefits, although they do have "unmet need" qualifying them for aid under the alternative computation procedure.

[11] The Court in *Rosado* recognized this as one of several effects attributable to § 402 (a)(23). 397 U. S., at 413. See also *id.*, at

indicating that this was part of the statutory purpose. Indeed, at the same time Congress enacted § 402 (a)(23) it included another section designed to induce States to reduce the number of individuals eligible for the AFDC program.[12] Thus, what little legislative history there is on the point, see *Rosado* v. *Wyman*, 397 U. S., at 409–412, tends to undercut appellants' theory. See *Lampton* v. *Bonin*, 304 F. Supp. 1384, 1391–1392 (ED La. 1969) (Cassibry, J., dissenting). See generally Note, 58 Geo. L. J. 591 (1970).

Appellants also argue that the Texas system should be held invalid because the alternative computation method results in greater work incentives for welfare recipients.[13] The history and purpose of the Social Security Act do indicate Congress' desire to help those on welfare become self-sustaining. Indeed, Congress has specifically mandated certain work incentives in § 402 (a)(8). There is no dispute here, however, about Texas' compliance with these very detailed provisions for work incentives. Neither their inclusion in the Act nor the language used by Congress in other sections of the Act supports the inference that Congress mandated the States to change their income-computation procedures in other, completely unmentioned areas.

Nor are appellants aided by their reference to Social Security Act § 402 (a)(10), 42 U. S. C. § 602 (a)(10), which provides that AFDC benefits must "be furnished

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409 n. 13. The Court did not, however, hold that each one of these effects was intended by Congress. In fact, the *Rosado* holding as to the "two broad purposes" of Congress was stated above, and the Texas system is perfectly consistent with it. The Court mentioned widened eligibility simply as one of several possible effects that *might* follow from the statute as so construed.

[12] Act of Jan. 2, 1968, Pub. L. No. 90-248, Tit. II, § 208, 81 Stat. 894, repealed 83 Stat. 45.

[13] See n. 7, *supra*.

with reasonable promptness to all eligible individuals." That section was enacted at a time when persons whom the State had determined to be eligible for the payment of benefits were placed on waiting lists, because of the shortage of state funds. The statute was intended to prevent the States from denying benefits, even temporarily, to a person who has been found fully qualified for aid. See H. R. Rep. No. 1300, 81st Cong., 1st Sess., 48, 148 (1949); 95 Cong. Rec. 13934 (remarks of Rep. Forand). Section 402 (a)(10) also prohibits a State from creating certain exceptions to standards specifically enunciated in the federal Act. See, *e. g.*, *Townsend* v. *Swank*, 404 U. S. 282 (1971). It does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of standards of need, income, and benefits.[14] Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellants' invitation to change this longstanding statutory scheme simply for policy consideration reasons of which we are not the arbiter.

III

We turn, then, to appellants' claim that the Texas system of percentage reductions violates the Fourteenth Amendment. Appellants believe that once the State has computed a standard of need for each recipient, it is arbitrary and discriminatory to provide only 75% of that standard to AFDC recipients, while paying 100% of recognized need to the aged, and 95% to the disabled and the blind. They argue that if the State adopts a

[14] Appellants' reliance on language from *Dandridge* v. *Williams*, 397 U. S. 471, 480–481 (1970), is misplaced. The Court there explicitly failed to reach the State's argument that the purpose of § 402 (a)(10) was primarily to prevent the use of waiting lists. *Id.*, at 481 n. 12.

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percentage-reduction system, it must apply the same percentage to each of its welfare programs.

This claim was properly rejected by the court below. It is clear from the statutory framework that, although the four categories of public assistance found in the Social Security Act have certain common elements, the States were intended by Congress to keep their AFDC plans separate from plans under the other titles of the Act.[15] A State is free to participate in one, several, or all of the categorical assistance programs, as it chooses. It is true that each of the programs is intended to assist the needy, but it does not follow that there is only one constitutionally permissible way for the State to approach this important goal.

This Court emphasized only recently, in *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970), that in "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more

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[15] Each categorical assistance program is embodied in a separate title of the Social Security Act, see n. 2, *supra*, and requires a state plan independent of the plans under the other titles. In 1962, however, Congress enacted 42 U. S. C. §§ 1381–1385, which for the first time enabled States to combine their plans, *but only for the non-AFDC programs*. Thus, while Congress has now enabled States to adopt a common plan for the other programs, it considered AFDC sufficiently different so as to require an independent plan.

than one constitutionally permissible method of solving them.

The standard of judicial review is not altered because of appellants' unproved allegations of racial discrimination. The three-judge court found that the "payment by Texas of a lesser percentage of unmet needs to the recipients of the AFDC than to the recipients of other welfare programs is not the result of racial or ethnic prejudice and is not violative of the federal Civil Rights Act or the Equal Protection Clause of the 14th Amendment." The District Court obviously gave careful consideration to this issue, and we are cited by its opinion to a number of subsidiary facts to support its principal finding quoted above. There has never been a reduction in the amount of money appropriated by the legislature to the AFDC program, and between 1943 and the date of the opinion below there had been five increases in the amount of money appropriated by the legislature for the program, two of them having occurred since 1959.[16] The overall percentage increase in appropriation for the programs between 1943 and the time of the District Court's hearing in this case was 410% for AFDC, as opposed to 211% for OAA and 200% for AB. The court further concluded:

> "The depositions of Welfare officials conclusively establish that the defendants did not know the racial make-up of the various welfare assistance categories prior to or at the time when the orders here under attack were issued."

Appellants in their brief in effect abandon any effort

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[16] Since the original opinion below, there has been an additional increase. Following a constitutional amendment, see n. 3, *supra*, the appropriation has risen from $6,150,000 to $23,100,000.

to show that these findings of fact were clearly erroneous, and we hold they were not.

Appellants are thus left with their naked statistical argument: that there is a larger percentage of Negroes and Mexican-Americans in AFDC than in the other programs,[17] and that the AFDC is funded at 75% whereas the other programs are funded at 95% and 100% of recognized need. As the statistics cited in the footnote demonstrate, the number of minority members in all categories is substantial. The basic outlines of eligibility for the various categorical grants are established by Congress, not by the States; given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could sur-

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Program	*Year*	*Percentage of Negroes and Mexican-Americans*	*Percentage of White-Anglos*	*Number of Recipients*
OAA	1969	39.8	60.2	
	1968	38.7	61.3	230,000
	1967	37.0	63.0	
APTD	1969	46.9	53.1	
	1968	45.6	54.4	4,213
	1967	46.2	53.8	
AB	1969	55.7	44.3	
	1968	54.9	45.1	14,043
AFDC	1969	87.0	13.0	
	1968	84.9	15.1	136,000
	1967	86.0	14.0	

vive such scrutiny, and we do not find it required by the Fourteenth Amendment.[18]

Applying the traditional standard of review under that amendment, we cannot say that Texas' decision to provide somewhat lower welfare benefits for AFDC recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.[19]

Similarly, we cannot accept the argument in MR.

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[18] In *James* v. *Valtierra*, 402 U. S. 137 (1971), it was contended that a California referendum requirement violated the Fourteenth Amendment because it imposed a mandatory referendum in the case of an ordinance authorizing low income housing, while referenda with respect to other types of ordinances had to be initiated by the action of private individuals. The Court responded:

"But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." *Id.*, at 142.

[19] Just as the State's actions here do not violate the Fourteenth Amendment, we conclude that they do not violate Title VI of the

JUSTICE MARSHALL's dissent that the Social Security Act itself requires equal percentages for each categorical assistance program. The dissent concedes that a State might simply refuse to participate in the AFDC program, while continuing to receive federal money for the other categorical programs. See *post*, at 577. Nevertheless, it is argued that Congress intended to prohibit any middle ground—once the State does participate in a program it must do so on the same basis as it participates in every other program. Such an all-or-nothing policy judgment may well be defensible, and the dissenters may be correct that nothing in the statute expressly rejects it. But neither does anything in the statute approve or require it.[20]

Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.* The Civil Rights Act prohibits discrimination in federally financed programs. We have, however, upheld the findings of nondiscriminatory purpose in the percentage reductions used by Texas, and have concluded that the variation in percentages is rationally related to the purposes of the separate welfare programs. The Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), is therefore inapposite. In *Griggs*, the employment tests having racially discriminatory effects were found not to be job-related, and for that reason were impermissible under the specific language of Title VII of the Civil Rights Act. Since the Texas procedure challenged here *is* related to the purposes of the welfare programs, it is not proscribed by Title VI simply because of variances in the racial composition of the different categorical programs.

[20] MR. JUSTICE MARSHALL's dissent cites the 1950 amendments to the Social Security Act as support for its novel statutory theory that States must provide equal aid levels in each welfare category. The 1950 amendments included "a revised method of determining the Federal share of assistance costs," 95 Cong. Rec. 13932, so that the Federal Government would pay a substantially equal percentage of matching funds to state plans in each of the categorical assistance programs. See S. Doc. No. 208, 80th Cong., 2d Sess., 101. But this revision of the grant-in-aid formula in § 403 of the Act was not accompanied by any corresponding amendment of § 402, the section of the Act dealing with congressional limitations on state AFDC

In conclusion, we re-emphasize what the Court said in *Dandridge* v. *Williams*, 397 U. S., at 487:

> "We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

Affirmed.

MR. JUSTICE STEWART joins in Part III of the Court's opinion.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

I would read the Act more generously than does the Court. It is stipulated that 87% of those receiving AFDC aid are blacks or Chicanos. I would therefore

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programs. Indeed, proponents of the 1950 amendments explicitly recognized and endorsed the longstanding policy that the Federal Government sets only minimum AFDC standards, while leaving the States "wide discretion both in determining policies and in setting standards of need." S. Doc. No. 208, *supra*, at 101. The enactment of a modified grant-in-aid formula hardly suggests Congress' intent to engage in "extensive alteration of the basic underlying structure of an established program." *Rosado* v. *Wyman*, 397 U. S., at 414 n. 17.

read the Act against the background of rank discrimination against the blacks and the Chicanos and in light of the fact that Chicanos in Texas fare even more poorly than the blacks. See L. Grebler, J. Moore, & R. Guzman, The Mexican-American People, pts. 2 and 3 (1970); J. Burma, Mexican-Americans in the United States 143–199 (1970); Schwartz, State Discrimination Against Mexican Aliens, 38 Geo. Wash. L. Rev. 1091 (1970); U. S. Commission on Civil Rights, The Mexican American (1968); U. S. Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest (1970). In *Rosado* v. *Wyman*, 397 U. S. 397, 413, we said that in administering such a program a State "may not obscure the *actual* standard of need." Texas does precisely that by manipulating a mathematical formula.

In *Rosado*, we described how some States establish upper limits or maximums of aid, while others, like Texas, "curtail the payments of benefits by a system of 'ratable reductions' whereby all recipients will receive a fixed percentage of the standard of need." *Id.*, at 409. Then in footnote 13 we described what that meant: "A 'ratable reduction' represents a fixed percentage of the standard of need that will be paid to all recipients. In the event that there is *some income that is first deducted*, the ratable reduction is applied to the amount by which the individual or family income falls short of need." *Id.*, at 409 n. 13 (emphasis added).

If Texas first deducted outside income and then made its ratable reduction, the welfare recipient would receive a somewhat more generous payment, as the opinion of the Court illustrates in footnote 6 of its opinion. Not only does the Texas system avoid this generous approach, but it also impermissibly constricts the standard of need in conflict with *Rosado*, *Dandridge* v. *Williams*, 397 U. S.

471, and *Townsend* v. *Swank*, 404 U. S. 282. Under Texas' method of computation, a family—otherwise eligible for AFDC benefits but with nonexempt income greater than the level of benefits and less than the standard of need—is denied both AFDC cash benefits and other noncash benefits such as medicaid.[1] It seems inconceivable that Congress could have intended that noncash benefits be denied those with incomes less than the standard of need solely because that income was earned rather than from categorical assistance. Yet this is precisely the result sanctioned by the Court today because eligibility for these programs is tied to the receipt of cash benefits.[2]

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[1] The Court's acknowledgment that "[t]he Texas computation method eliminates any . . . financial incentive [for welfare recipients to obtain outside income], so long as the[ir] outside income remains less than the[ir] . . . reduced standard of need," *ante*, at 541, understates the effect of the Texas system on the recipients. The Texas system not only fails to provide an incentive for those on the welfare rolls to break the cycle of poverty by obtaining employment, but—in certain cases—it also penalizes those who seek employment. The family with nonexempt income equal to Texas' level of benefits stands in much the same cash position as the AFDC recipient, but solely because that family has earned that last marginal dollar that makes it no longer eligible for categorical assistance it also is denied medical assistance, social services, and training. The Solicitor General tells us that the value of the medical services alone is worth $50–$60 per month to the average Texas AFDC family. Memorandum for the United States as *Amicus Curiae* 7 n. 5.

[2] Eligibility for family development services is keyed to the "recei[pt] [of] aid to families with dependent children," 42 U. S. C. § 602 (a)(14); so, too, with employment assistance, *id.*, at § 602 (a)(15)(A) ("receiving aid under the plan"); protection against child's neglect or abuse, *id.*, at § 602 (a)(16) ("receiving aid"); plans to establish paternity and secure support, *id.*, at § 602 (a)(17)(A)(i) and (ii) ("receiving aid," "receiving such aid"); work incentive programs, *id.*, at § 602 (a)(19)(A)(i) ("receiving aid to families with

One of the stated purposes of the AFDC program is "to help such parents or relatives [of needy dependent children] *to attain or retain capability for the maximum self-support and personal independence.*" 42 U. S. C. § 601 (emphasis added). The Senate Finance Committee has stated, "A key element in any program for work and training for assistance recipients is *an incentive for people to take employment.*" S. Rep. No. 744, 90th Cong., 1st Sess., 157 (1967) (emphasis added). The majority acknowledges that "[t]he history and purpose of the Social Security Act . . . indicate Congress' desire to help those on welfare become self-sustaining." *Ante*, at 544. But it nonetheless ignores the explicit congressional policy in favor of work incentives and upholds a system which provides penalties and disincentives for those who seek employment.[3]

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dependent children"); and medical assistance plans, *id.*, at § 1396a (a)(10) ("individuals receiving aid or assistance").

Would Congress have tied needy families' eligibility for these programs to the receipt of cash benefits had it foreseen that this Court would disregard the statutory mandate "that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals"? 42 U. S. C. § 602 (a)(10).

[3] The rationale which the Court uses to reach this result is at odds with time-honored rules of statutory interpretation. First, the Court gives but a grudging interpretation to the recital in § 401 of the Act, 42 U. S. C. § 601, that one of Congress' purposes was to encourage welfare recipients to become self-supporting. The Court in effect disregards the rule that recitals embody "the general purposes which . . . Congress undertook to achieve." *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 297. And see *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 563; *United States* v. *Fisher*, 2 Cranch 358, 386. Second, the Court attributes to Congress the purpose of providing work incentives, *e. g.*, 42 U. S. C. § 602 (a)(8), while at the same time allowing the imposition of penalties and disincentives for obtaining employment. The Court departs from the principle that "[i]n the exposition of statutes," various sections of the same act "are supposed to have the same object," *Kohlsaat* v. *Murphy*, 96

The California Supreme Court in *Villa* v. *Hall*, 6 Cal. 3d 227, 490 P. 2d 1148, struck down the system this Court approves today, where California used a statutory maximum of payments rather than a ratable reduction. The California Supreme Court quite properly said that what the State was attempting was inconsistent with *Rosado*. Moreover, it had an additional reason:

> "The conclusion that the Social Security Act requires outside income to be subtracted from standards of need rather than from statutory maximums or ratable reductions is also founded on a strong public policy of encouraging welfare recipients to become constantly more self-supporting. Yet deducting income from statutory maximums makes gainful employment significantly less attractive to the recipient. This follows because all nonexempt income will be offset directly against the amount of the grant and not against the standard of need to determine actual need; for every nonexempt dollar earned, the amount of aid will therefore be decreased one dollar. Since the grant is always less than the standard of need, in many instances the system adopted by the Welfare Reform Act will result in an individual's need not being met even after adding both exempt and nonexempt income to the AFDC payment. Such recipients will be forced to exist below the bare minimum necessary for adequate care, even though they have commenced, by obtaining employment, to break free from the debilitating 'welfare syndrome.' The practice thus conflicts with

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U. S. 153, 159–160, and holds instead that Congress was working at cross-purposes in different subsections of § 402, 42 U. S. C. § 602. Finally, by giving the Social Security Act a miserly interpretation, the Court disregards the canon that remedial legislation, such as the Social Security Act, is to be interpreted liberally to effectuate its purposes. *E. g., Peyton* v. *Rowe*, 391 U. S. 54, 65.

the stated federal policy to provide incentives to obtain and maintain an employment status." *Id.*, at 235–236, 490 P. 2d, at 1153–1154.

Moreover, *Townsend* v. *Swank*, 404 U. S. 282, calls for a reversal in the present case. It is conceded that plaintiff Maria T. Davilla and 2,470 other families are denied aid in Texas by reason of its new formula, see 304 F. Supp. 1332, 1343, despite the fact that their income is below the standard of need and that of those receiving AFDC aid only 75% of their needs is met.[4]

Under § 402 (a)(10) of the Social Security Act (which governs AFDC) "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U. S. C. § 602 (a)(10). In *Townsend* children 18 through 20 years of age who attended high school or vocational training were eligible for AFDC benefits but such children in college were not eligible. We held that "a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."[5] 404 U. S., at 286.

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[4] The percentages of need that will be met by Texas under the various heads are as follows:

Old Age Assistance	100%
Aid to the Blind	95%
Aid to the Permanently and Totally Disabled	95%
Aid to Families with Dependent Children	75%

When this action was instituted, Texas' AFDC percentage level of benefits was only 50% of the standard of need. During the course of this litigation, Texas increased the AFDC level of benefits to 75% of need.

[5] To the same effect is our recent decision in *Engelman* v. *Amos*, 404 U. S. 23 (1971), aff'g *sub nom. X* v. *McCorkle*, 333 F. Supp. 1109 (NJ 1970). There, relying on *Rosado* v. *Wyman*, 397 U. S. 397, the District Court held inconsistent with the Social Security Act—and thus unconstitutional under the Supremacy Clause—a state provision

What Texas does here is to exclude large numbers of AFDC beneficiaries by application of a state eligibility test that is narrower than the one we approved in *Rosado*. While a State has some discretion in its use of federal funds, it may not manipulate by its own formula groups of "needy" claimants. The decision to participate or not in the federal program is left to the States. *Townsend* v. *Swank, supra,* at 290–291. When, as here, federal and state funds are in short supply, the problem is not to lop off some categories of those in "need" but to design a way of managing the system of "need" so as not to raise equal protection questions.[6] *Id.*, at 291.

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which denied AFDC cash payments and ancillary benefits to those whose nonexempt income was less than the standard of need established by the State. We unanimously affirmed that decision. To be sure, *Engelman* dealt with federal provisions different from those presently in issue (42 U. S. C. § 602 (a)(8)(A)(ii); 45 CFR § 233.20 (a)(3)(ii)), but that does not distinguish the case. Rather, it merely emphasizes that which—until today—was the broad scheme of the Social Security Act: those whose nonexempt income was below the standard of need established by the State and who met the other nonfinancial criteria for eligibility were to receive benefits. See 42 U. S. C. § 602 (a)(10).

[6] To be sure, "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King* v. *Smith,* 392 U. S. 309, 318–319 (footnotes omitted). Accommodation of a State's limited financial resources, however, is to be made in setting the level of benefits and not by gerrymandering the standard of need. *Rosado* v. *Wyman, supra,* at 413. Here, the "reduced standard of need" which the majority recognizes to be the consequence of the Texas computation procedures, *ante,* at 543 n. 10, violates § 402 (a)(23) of the Social Security Act, 42 U. S. C. § 602 (a)(23), and our decision in *Rosado*. Section 402 (a)(23) mandated an upward revision of the standard of need, and the "reduced standard of need" Texas applies to certain of its needy violates this requirement.

Section 402 (a)(10) of the Social Security Act provides that AFDC shall be furnished with reasonable promptness to all *eligible* individuals. The House Report in commenting on it said:

> "Shortage of funds in aid to dependent children has sometimes, as in old-age assistance, resulted in a decision not to take more applications or to keep eligible families on waiting lists until enough recipients could be removed from the assistance rolls to make a place for them. . . . [T]his difference in treatment accorded to eligible people results in undue hardship on needy persons and is inappropriate in a program financed from Federal funds." H. R. Rep. No. 1300, 81st Cong., 1st Sess., 48 (1949).

As the Court said in *Dandridge* v. *Williams*, 397 U. S., at 481, "So long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." It is violated here because nearly 2,500 families that satisfy the requirements of "need" are denied any relief.[7]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, and with whom MR. JUSTICE STEWART joins as to Part I only, dissenting.

Appellants, recipients of Aid to Families With Dependent Children (AFDC) in Texas, brought this action to challenge two distinct aspects of the Texas AFDC program. First, appellants challenge the manner in which

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[7] 45 CFR § 233.10 (a)(1)(ii) provides:

"The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act."

Texas arrives at the amount it will pay to persons who are needy. Second, they urge that Texas acts illegally in providing more money for persons receiving aid under other social welfare legislation than for persons receiving AFDC aid. The Court rejects both claims. I dissent.

Before proceeding to explain why I disagree with the Court, I would like to illustrate what the disputes in this case are all about. If a State is unable or unwilling to establish a level of AFDC payments to meet all the needs of all recipients, federal law permits the State to use a percentage-reduction factor as a method of reducing payments in a somewhat equitable manner. Texas has adopted a system in which the percentage-reduction factor is applied against the standard of need before outside income is deducted. Appellants contend that federal law requires the State to deduct outside income before the percentage-reduction factor is applied. While describing the differences between the two alternatives is a Herculean task, the figures themselves are not difficult to comprehend. Footnote 6 of the Court's opinion, for example, demonstrates that the Texas system provides less aid to a family with outside income than the alternative system. It is also immediately obvious that under the Texas system, as soon as the family's income reaches $150, it no longer receives anything from the State, whereas under the alternative, a family earning the same $150 would continue to receive some state funds. Hence, the Texas method of computation contracts the class of families eligible to receive state aid. Appellants contend that the characteristics of the Texas system are inconsistent with federal legislation and that only the alternative system comports with the intent of Congress. I agree.

Appellants also claim that the percentage-reduction factor employed by Texas is illegal, irrespective of the

method of computing payments, because it is lower than the factor used in other social welfare programs that have participants with identical standards of need. I also agree with appellants on this point, but for slightly different reasons from those they have urged.

I

A. In considering the question whether Texas' method of computing eligibility for AFDC payments comports with the federal statute, 42 U. S. C. § 601 *et seq.*, it is important to keep in mind the words of Mr. Justice Cardozo: "When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states." *Helvering* v. *Davis*, 301 U. S. 619, 645 (1937). Mr. Justice Harlan reiterated this point in *Rosado* v. *Wyman*, 397 U. S. 397, 422–423 (1970), when he stated that irrespective of the policies that a State might wish to pursue by utilizing AFDC money in one way or another, the ultimate question to be answered in each case is whether the action of the State comports with the requirements of federal law.

The Court concludes in the instant case that there is no general congressional policy violated by Texas' choice between the alternative methods of applying a percentage-reduction factor to its determined standard of need, and also that no specific statutory provision prohibits Texas from choosing one alternative rather than the other. In concluding that the legislative history is inconclusive and that "what little legislative history there is on the point . . . tends to undercut appellants' theory," the Court has, in my opinion, taken only a superficial look into the history of the statute and has ignored the intent of Congress in various sections of

the AFDC legislation as interpreted by this Court in prior cases.

B. I begin by considering the impact of § 402 (a)(23) of the Social Security Act of 1935, as amended, 81 Stat. 898, 42 U. S. C. § 602 (a)(23), on appellants' argument. That section provides that

> "(a) A State plan for aid and services to needy families with children must
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> . . . . . .
>
> "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

Consideration of this section must, of course, begin with *Rosado* v. *Wyman, supra,* where we examined the derivation of this section in great detail.

The relevant facts in *Rosado* are concisely stated in 397 U. S., at 416. New York State had changed its AFDC program so that it no longer determined need on an individualized basis, but instead substituted a system fixing maximum family allowances based on the number of individuals per family. The result was a drastic reduction in overall payments. New York State welfare recipients brought the suit in *Rosado,* claiming that by changing its AFDC system from an individualized-grant program to a maximum-grant program, New York had violated § 402 (a)(23).

Despite our recognition that "[t]he background of § 402 (a)(23) reveals little except that we have before us a child born of the silent union of legislative compromise," 397 U. S., at 412, we determined to discover

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what Congress had in mind in adding the section to the pre-existing AFDC legislation. We concluded that two general purposes could be ascribed to the section:

> "First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis." 397 U. S., at 412–413.

These conclusions led us to reject the holding of the District Court, 304 F. Supp. 1354, 1377, that Congress intended to prevent any reduction whatever in AFDC payments, and to reject the argument of the welfare recipients that if payments could be reduced § 402 (a) (23) would be meaningless. We decided that "a State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the *actual* standard of need." 397 U. S., at 413 (emphasis in original). Far from emasculating the statute, our reading recognized that the statute had at least three specific salutary effects, and that these were the effects that Congress intended in enacting the legislation:

> "It has the effect of requiring the States to recognize and accept the responsibility for those additional individuals whose income falls short of the standard of need as computed in light of economic realities and to place them among those eligible for the care and training provisions. Secondly, while it leaves the States free to effect downward adjustments in the level of benefits paid, it accomplishes within that framework the goal, however modest, of forcing a State to accept the political

> consequence of such a cutback and bringing to light the true extent to which actual assistance falls short of the minimum acceptable. Lastly, by imposing on those States that desire to maintain 'maximums' the requirement of an appropriate adjustment, Congress has introduced an incentive to abandon a flat 'maximum' system, thereby encouraging those States desirous of containing their welfare budget to shift to a percentage system that will more equitably apportion those funds in fact allocated for welfare and also more accurately reflect the real measure of public assistance being given." *Id.*, at 413–414.

Thus, it is clear that we based our decision in *Rosado*, a decision that interpreted § 402 (a)(23) to permit a decrease in actual AFDC payments, largely on the conclusion that Congress wanted, not to bar decreases, but to accomplish other objectives. The fact is that the Court today undermines each of those objectives and destroys the premise on which *Rosado* was decided.

One specific congressional goal we saw in § 402 (a)(23) was that "[r]ecalculation of need may serve to render eligible for benefits families which may appear under unadjusted standards marginally to have attained self-sufficiency, but which in fact are unable to subsist at the present cost of living." Memorandum for the United States as *Amicus Curiae* in *Rosado* v. *Wyman*, No. 540, O. T. 1969, p. 8. In other words, we read the section as expressing Congress' willingness to permit reductions in actual payments in return for the addition of more families to the rolls of AFDC recipients. Accord, *Lampton* v. *Bonin*, 304 F. Supp. 1384 (ED La. 1969), vacated and remanded for reconsideration in light of *Rosado*, 397 U. S. 663 (1970); *Alvarado* v. *Schmidt*, 317 F. Supp. 1027 (WD Wis. 1970). As I have pointed out above, the Texas

system limits the number of AFDC recipients and eliminates marginal cases. This is directly contrary to the intent of Congress as we saw it in *Rosado*.

A second legislative aim that we saw in the section was to force States to realize the political consequences of reducing welfare payments. It must be clear that the Texas system of administering AFDC payments effectively undermines this aim by enabling the State to maintain a constant percentage reduction factor so that the system on its face appears to contain no reductions in payments. Welfare reductions are surreptitiously accomplished by eliminating those persons who have marginal income from eligibility for AFDC payments. While the congressional intent may not be totally emasculated by this system, it is certainly not well served.

The third and final purpose that we found that Congress had specifically in mind in enacting § 402 (a) (23) was to provide an incentive to States to abandon a flat "maximum" system. Even though Texas does not now use such a system, the Court's approval of the system that Texas does use will effectively remove the incentive from the statute. A State that uses a flat maximum system was required by § 402 (a)(23) to adjust the maximums upward to reflect a rise in the cost of living. Since a State that uses a percentage-reduction system may avoid the strains cost-of-living adjustments place on the budget simply by lowering the percentage that it chooses to pay, the statute encouraged abandonment of flat maximums in favor of the more equitable percentage reductions. The Court undermines the incentive by offering States a way to circumvent the cost-of-living adjustments under the flat maximum system. In order to maintain the maximums without increasing expenditures, States could, under the Court's opinion, begin to use the maximum to determine AFDC eligibility

rather than the standard of need. The result of this approach would be to reduce the number of persons eligible for assistance and to reduce the grants of anyone with any outside income. Rather than serve as an incentive to States to change to a percentage-reduction system, as Congress intended, § 402 (a)(23) may now be a powerful incentive to States to maintain or revert to maximum grants.

The manner in which the incentive that *Rosado* saw in § 402 (a)(23) is stifled can be illustrated by another look at the family having an income of $100 and a need of $200. Footnote 6 of the Court's opinion demonstrates that under the Texas percentage-reduction system, even if the family had no income, the maximum amount of aid that the family could obtain would be $150. Let us assume that Texas maintained a maximum grant system and that prior to the enactment of § 402 (a)(23), the maximum grant for a family with $200 need was $100. We assumed in *Rosado* that the following computation would be made.

Need	$200
Income	$100
Unmet Need	$100
Maximum Grant	$100
Total Family Funds	$200

Section 402 (a)(23) required an increase in the standard of need and the level of maximum grants to reflect the rise in the cost of living. Assuming that a 20% increase was mandated by the rise in living costs, it is obvious that if the number of families remained stable and if income were stable, the costs of AFDC to the State would increase by 20%. There was an incentive to change to a percentage-reduction system to avoid this.

Until recently, no one thought that the State could change to the following system in order to reflect the rise in the cost of living:

New Need	$240
New Maximum Grant	$120
Family Income	$100
State Aid	$ 20

To state it more simply, the maximum grant is similar to, and designed to serve the same purposes as, the percentage-reduction factor. If the percentage-reduction factor can be applied to need before income is subtracted, it is impossible to see why income could not be set off against maximum grants. True, Texas did not choose this alternative, but it is available under today's decision. A State can, by changing the manner in which it sets off income, absorb an increase in maximums and end up paying less. Where is the incentive now to adopt percentage-reduction systems?

This illustration is much more than mere speculation as to what might happen under today's decision. The illustration represents what at least one State—California—has already done, or tried to do. Only very recently, the California Supreme Court struck down the State's AFDC scheme for noncompliance with the federal statute. *Villa* v. *Hall*, 6 Cal. 3d 227, 490 P. 2d 1148 (1971).

The California Supreme Court, having been referred to the District Court opinion in the instant case as support for California's system, took the position that neither the California nor the Texas system could stand in light of *Rosado*. I agree. Indeed, the United States in its Memorandum as *Amicus Curiae* in this case (p. 5) concedes that if *Rosado* represents "a binding

construction of the Act, appellants are thus entitled to prevail." The Government proceeds to argue that the question presented here was not before us in *Rosado*. *Ibid.* I must agree with appellants that the Government's argument is disingenuous, at best. See Brief for Appellants 80. The question of what § 402(a)(23) means was most certainly before us in *Rosado*. It was, in fact, all that was before us. In that case we rejected the broad construction that the District Court had given the section, but we endeavored as best we could to extract some meaning from its muddled history. The United States seeks here to have us do what we explicitly said we would not do in *Rosado, i. e.*, interpret the section in such a way that it is nothing more than a "meaningless exercise in 'bookkeeping.'" 397 U. S., at 413. If we were not making a "binding construction" of the statute in *Rosado*, it is impossible for me to ascertain what we were doing. Hence, I agree with the Government that appellants are entitled to prevail.

Surprisingly enough, the Court makes even shorter shrift of *Rosado* than does the Government. In a footnote, the Court states that widened eligibility and the other effects that *Rosado* said were intended by Congress when it enacted § 402 (a)(23) were merely possible effects of the statute, not necessary ones. I submit that this cavalier treatment of *Rosado* is completely unwarranted. *Rosado* was not an easy case. The absence of a clear legislative history forced us to examine the "muted strains" of the congressional voice and to struggle to "discern the theme in the cacophony of political understanding." 397 U. S., at 412. Unlike the Court in this case, which simply looks to see if the legislative history is distorted enough to be ignored, the Court in *Rosado* carefully scrutinized every aspect of the history in order to perceive the congressional intent. That was a difficult task, but not an impossible one. The balance

that we saw Congress striking in reducing payments while increasing eligibility has already been described. We relied on this balance to decide *Rosado*. We were not merely speculating as to the intent of Congress; we were holding that there was a specific intent that was binding in that case. That decision, in my view, is also binding here. This is my first disagreement with the majority.

C. The second provision in the AFDC legislation that I believe is relevant is § 402 (a)(8) of the Social Security Act, as amended, 81 Stat. 881, 42 U. S. C. § 602 (a)(8), which was added to the AFDC statute along with § 402 (a)(23) in 1968. The purpose of this section is to encourage AFDC recipients to seek private employment and to end their need for public assistance. H. R. Rep. No. 544, 90th Cong., 1st Sess. (1967); S. Rep. No. 744, 90th Cong., 1st Sess. (1967). To accomplish this objective the statute provides that all of the earned income of each dependent child receiving AFDC aid who is a full- or part-time student, and a portion of the earned income of certain other relatives, will be disregarded in the State's determination of need. We only recently had occasion to consider the effect of this provision in *Engelman* v. *Amos*, 404 U. S. 23 (1971).

In *Engelman* we considered a New Jersey scheme for administering AFDC funds that established income ceilings for families. When the families' incomes exceeded the ceilings they no longer were eligible for AFDC aid. The District Court analogized *Engelman* to *Rosado* v. *Wyman*, *supra*, and determined that the State's system was inconsistent with the federal Act. 333 F. Supp. 1109. The District Court recognized that the 1968 amendments to the AFDC legislation were designed to increase eligibility for AFDC aid, not to decrease it. Because the District Court viewed § 402 (a)(8) as requiring a State to disregard certain kinds of

income in determining eligibility for aid, the District Court struck down the New Jersey scheme, in effect holding that New Jersey could not evade the income disregard by imposing an income ceiling not contemplated by Congress. Families that exceeded the State's income ceilings were still entitled to AFDC aid so long as their income, excluding income covered by § 402 (a) (8), did not exceed the State's standard of need. The effect of the decision was to increase the class of persons eligible for AFDC aid. We affirmed the decision without even hearing argument.

Both "the New Jersey and the Texas provisions . . . appear to have been animated by the same desire . . . ." Memorandum for the United States as *Amicus Curiae* 11. Both seek to limit the number of AFDC recipients, and both violate the federal statute. Indeed, the very purpose of § 402 (a)(8)—to encourage people to work by permitting them to continue to draw AFDC funds—shows that Congress wanted as many needy people as possible to be part of the program.

The Texas scheme certainly does not violate § 402 (a) (8) in the way that the New Jersey scheme did, for as far as we know, Texas excludes income as required by the statute when computing eligibility. But, as the opinion of the Court indicates, the Texas system has a fault not found in New Jersey: *i. e.*, Texas discourages recipients from earning outside income. This is why I believe that Texas violates the spirit of the federal statute.

It might be argued that Congress only sought to encourage certain AFDC recipients to earn income and only in a certain amount—the persons and amounts specified in § 402 (a)(8). This argument might be persuasive but for one fact—Congress never had any idea that a State would attempt to employ a system such as that used by Texas. Nowhere in the legislative history

is there any mention of such a system. See, *e. g.*, House Committee on Ways and Means, Section-By-Section Analysis of H. R. 5710, 90th Cong., 1st Sess. (Comm. Print 1967). Congress was, in fact, informed by HEW that a different standard from that used by Texas was required. See Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., pt. 1, pp. 255–265 (testimony of Wilbur Cohen). Until very recently, every indication by HEW was that the Texas system would be unlawful. In light of the state of ignorance in which Congress found itself, it is not surprising that there is no specific rejection of the Texas system in the 1968 amendments. But § 402 (a)(8) and everything in the legislative history certainly indicate that Congress had a strong desire to encourage AFDC recipients to work. Because the Texas program is inconsistent with this desire, I believe it is illegal.

This is the second reason for my disagreement with the Court.

D. Another section of the statute that must be examined is § 402 (a)(10) of the Social Security Act, 64 Stat. 550, as amended, 42 U. S. C. § 602 (a)(10), which requires that a state AFDC plan shall

> "provide . . . that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals."

The Court states that the primary purpose of this section was to outlaw the use of waiting lists as a means of minimizing a State's welfare expenditures. There is clearly support for this view, as the Court noted in *Dandridge* v. *Williams*, 397 U. S. 471, 481 n. 12 (1970).

Before the Court in *Dandridge* was the question whether maximum-grant limitations were inconsistent with the federal statute. The Court upheld the maximums, but said in the course of so doing: "So long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." *Id.*, at 481. This is plainly dictum, but I believe that it is well-considered dictum that should be followed in this case.

It must be remembered that *Dandridge* and *Rosado* were decided on the same day. Thus, the Court assumed in *Dandridge* that the 1968 amendments to the AFDC legislation expanded the list of eligible recipients in the manner suggested in *Rosado*. The Court was also aware in *Dandridge* that § 402 (a)(7) of the Social Security Act, as amended, 53 Stat. 1379, 42 U. S. C. § 602 (a)(7), had been part of the AFDC statute since 1939. That section provides that

> "except as may be otherwise provided [in § 402 (a)(8), discussed, *supra*] . . . the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . ."

The Court assumed, therefore, that in offering aid a State would first set a standard of need and then examine the income levels of applicants for aid. Anyone whose income was less than the standard of need would be eligible for assistance, or so the Court assumed. *Dandridge*, of course, established that the aid that might be forthcoming did not have to equal need and that large families could get proportionately less aid than small families. Just as in *Rosado*, the Court in *Dandridge* viewed the intent of Congress to be to aid as many needy people as possible, rather than to offer as much aid as possible to a lesser number of people. In light of this, I believe

that today's decision violates the spirit of *Dandridge*, as well as the holding of *Rosado*.

Moreover, in my view, § 402 (a)(7) tells the States how to compute eligibility, and that section does not allow for the Texas scheme. Despite the position of the Government in this case, I find support for my reading of § 402 (a)(7) in HEW's own regulations, especially 45 CFR §§ 233.20 (a)(2), 233.20 (a)(3)(ii), which indicate to me that income is to be subtracted from the standard of need before any determination is made as to how much aid the State will give.

Because I believe the Texas system violates § 402 (a)(7), it seems to me that eligible persons are being denied aid in violation of § 402 (a)(10), which requires that aid be furnished to all eligible persons promptly. For me, this case is no different from *King* v. *Smith*, 392 U. S. 309 (1968) (striking down substitute-father regulation) or *Townsend* v. *Swank*, 404 U. S. 282 (1971) (striking down restriction on receipt of aid by college students). The state procedure denies eligible persons aid, and, regardless of the State's purposes, the procedure cannot stand in conflict with the federal statute.

I disagree with the Court a third time.

E. The last portion of the federal statute that I believe should be considered is that portion dealing with the social services that are available to AFDC recipients. See, *e. g.*, 42 U. S. C. §§ 602 (a)(14), (15) (assistance in family planning and child-welfare services; assistance in entering the work force and reducing the incidence of births out of wedlock); 42 U. S. C. §§ 602 (a)(19), 632 (employment training programs); 42 U. S. C. § 1396a (a)(10) (medical assistance). Congress keyed all of these provisions to persons or families that were receiving aid. By limiting the number of such persons and families receiving aid, Texas has also limited the availability of

these social services. At least one other court has concluded that

> ". . . Congress's major concern was the provision of family counseling and rehabilitation services, work incentives, and family planning programs to reduce out-of-wedlock births, for all persons in the family, in order to promote self-support and child development and to strengthen family life. . . . By making those with marginal incomes eligible for AFDC by raising the standard of need, more persons would be eligible for such services, which Congress considered vital to cut down in the long run the numbers dependent on welfare." (Citation omitted.) *Lampton* v. *Bonin,* 304 F. Supp., at 1389.

We suggested the same thing in *Rosado,* 397 U. S., at 413. While the Court recognizes that the Texas system deprives persons with an "unmet need" of an opportunity to utilize these services (n. 10) and thus relegates these persons to perpetual dependence on welfare, the realization is apparently a source of no concern. But it was a source of tremendous concern to Congress. The value of medical assistance alone to an average Texas AFDC family is in the range of $50–$60 per month. Memorandum for the United States as *Amicus Curiae* 7 n. 5. Since needy families are rendered more needy by Texas' system, their ability to escape the confines of the welfare rolls is substantially impaired. At the same time, the goals of Congress as described in the preceding quotation are also impaired. There is no reason, nor any justification, for reading the statute this way.

Since I believe that Congress intended that as many needy persons as possible be permitted to avail themselves of the various services provided or improved in the 1968 amendments, I again disagree with the conclusions of the Court.

F. In concluding my analysis of this aspect of Texas' percentage-reduction system, I add one final note. Thus far I have confined myself to examining the specific provisions of the AFDC legislation. In attempting to focus on each section individually in order to determine its role in the statutory scheme, something of the general flavor of the overall legislation is undoubtedly lost. That flavor, it seems to me, is to assist needy families to maintain strong family bonds and to assist needy individuals to realize their potential as unique human beings by providing them with the basic necessities of life, along with incentives and training to encourage them to work to help themselves. The Texas system negates the salutary aspects of the legislation by deterring the needy from working, by depriving the needy of social services, and by excluding some needy from any AFDC aid whatsoever. There is no conceivable reason to permit Texas to subvert the aims of Congress in this way.

II

Appellants also challenge the percentage-reduction figure itself. It is agreed that Texas has established an identical standard of need for the four social welfare programs that it administers—Old Age Assistance (OAA), Aid to the Blind (AB), Aid for the Permanently and Totally Disabled (APTD), and AFDC. But Texas provides 100% of recognized need to the aged and 95% to the disabled and the blind, while it provides only 75% to AFDC recipients. It is this disparity to which appellants also object.

A. Appellants base their primary attack on the Fourteenth Amendment; they argue that the percentage distinctions between the other welfare programs and AFDC reflect a racially discriminatory motive on the part of Texas officials. Thus, they argue that there is a violation of the Equal Protection Clause. I believe that it

is unnecessary to reach the constitutional issue that appellants raise, and, therefore, I offer no opinion on its ultimate merits. I do wish to make it clear, however, that I do not subscribe in any way to the manner in which the Court treats the issue.

If I were to face this question, I would certainly have more difficulty with it than either the District Court had or than this Court seems to have. The record contains numerous statements by state officials to the effect that AFDC is funded at a lower level than the other programs because it is not a politically popular program. There is also evidence of a stigma that seemingly attaches to AFDC recipients and no others. This Court noted in *King* v. *Smith*, 392 U. S., at 322, that AFDC recipients were often frowned upon by the community. The evidence also shows that 87% of the AFDC recipients in Texas are either Negro or Mexican-American. Yet, both the District Court and this Court have little difficulty in concluding that the fact that AFDC is politically unpopular and the fact that AFDC recipients are disfavored by the State and its citizens, have nothing whatsoever to do with the racial makeup of the program. This conclusion is neither so apparent, nor so correct in my view.

Moreover, because I find that each one of the State's reasons for treating AFDC differently from the other programs dissolves under close scrutiny, as is demonstrated, *infra*, I am not at all certain who should bear the burden of proof on the question of racial discrimination. Nor am I sure that the "traditional" standard of review would govern the case as the Court holds. In *Dandridge* v. *Williams*, *supra*, on which the Court relies for the proposition that strict scrutiny of the State's action is not required, the Court never faced a question of possible racial discrimination. Percentages themselves are certainly not conclusive, but at some point a showing that

state action has a devastating impact on the lives of minority racial groups must be relevant.

The Court reasons backwards to conclude that because appellants have not proved racial discrimination, a less strict standard of review is necessarily tolerated. In my view, the first question that must be asked is what is the standard of review and the second question is whether racial discrimination has been proved under the standard. It seems almost too plain for argument that the standard of review determines in large measure whether or not something has been proved. *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

These are all complex problems, and I do not propose to resolve any of them here. It is sufficient for me to note that I believe that the constitutional issue raised by appellants need not be reached, and that in choosing to reach it, the Court has so greatly oversimplified the issue as to distort it.

B. Appellants also challenge the distinction between programs under Title VI of the 1964 Civil Rights Act, 42 U. S. C. § 2000d:

> "No person in the United States shall, on the ground of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."

Only last Term in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), we had occasion to strike down under Title VII of the 1964 Act, 42 U. S. C. § 2000e, employment practices that had a particularly harsh impact on one minority racial group and that could not be justified by business necessity. We indicated in that case that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups."

Id., at 432. We said, in fact, that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Ibid.* (emphasis in original). That decision even placed the burden on the employer "of showing that any given requirement must have a manifest relationship to the employment in question." *Ibid.*

There has been a paucity of litigation under Title VI, and I am not prepared at this point to say whether or not a similar analysis to that used in *Griggs* should be used in Title VI cases. This is a question of first impression in this Court, and I do not think we have to reach it in this case. I include this section only to make plain that I do not necessarily reject the argument made by appellants; I simply do not reach it.

C. This brings me to what I believe disposes of the question presented: the disparity between the various social welfare programs is not permissible under the federal statutory framework.

The four social welfare programs offered by Texas are funded in part by the Federal Government. Each program is governed by a separate statute: OAA, 42 U. S. C. § 301 *et seq.;* AFDC, 42 U. S. C. § 601 *et seq.;* AB, 42 U. S. C. § 1201 *et seq.;* APTD, 42 U. S. C. § 1351 *et seq.* No State is compelled to participate in any program, and any State that wants to participate can choose to do so in one, several, or all of the programs.

There is no doubt that States are free to choose whether or not to participate in these programs, and it is also clear that each State has considerable freedom to allocate what it wants to one or more programs by establishing different standards of need to compute eligibility for aid. *King* v. *Smith*, 392 U. S., at 318–319. It is also true, however, that the basic aims of the four programs are identical. Indeed, when Congress first enacted the programs in 1935, it viewed them all as necessary to

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provide aid to families unable to obtain income from private employment. The beneficiaries of the various programs shared the basic characteristics of need and dependence. H. R. Rep. No. 615, 74th Cong., 1st Sess., 3. While the programs as they now exist go well beyond merely furnishing financial assistance as they did originally, they still maintain similar goals.

Moreover, all four programs were simultaneously amended in 1956 to provide for social and rehabilitative services to enable all needy individuals to attain the maximum economic and personal independence of which they were capable. Each program now requires a State to describe, in its plan for each social welfare program it administers, the services it offers to accomplish this objective. See 42 U. S. C. §§ 302 (a)(11); 602 (a)(14); 1202 (a)(12); 1352 (a)(11).

Congress has given the States authority to set different standards of need for different programs. But where, as here, the State concludes that the standard of need is the same for recipients of aid under the four distinct statutes, it is my opinion that Congress required that the State treat all recipients equally with respect to actual aid. In other words, as I read the federal statutes, they are designed to accomplish the same objectives, albeit for persons disadvantaged by different circumstances.

States clearly have the freedom to make a bona fide determination that blind persons have a greater need than dependent children, that adults have a higher standard of need than children, that the aged have more need than the blind, and so forth.

But, in this case, Texas made an independent determination of need, and it determined that the need of all recipients was equal. In this circumstance, I find nothing in the federal statute to enable a State to favor one group of recipients by satisfying more of its need,

while at the same time denying an equally great need of another group. The purposes and objectives of the statutes are the same, those eligible for aid are suffering equally, and Congress intended that once a State chose to participate in the programs similarly situated persons would be treated similarly.

Everything in this record indicates that the recipients of the various forms of aid are identically situated. Although the District Court accepted the State's contentions that there are differences between AFDC children and other recipients which warranted different treatment under the federal statutes, I find each of the reasons offered totally unpersuasive.

First, Texas argues that AFDC children can be employed, whereas recipients of other benefits cannot be. Assuming *arguendo* that this is true, it is an argument that falls of its own weight. Whatever income the children earn is subtracted from need, or it is excluded from consideration under § 402 (a)(8) to encourage self-help. Thus, income is already reflected in the computation of payments, or it is excluded in order that a specific legislative goal may be furthered. Thus, income is irrelevant in any explanation of the differences between the percentage reductions applied to the various programs. It should also be noted that a recipient's income is also taken into consideration in programs other than AFDC. See 42 U. S. C. §§ 302 (a)(10)(A); 1202 (a)(8); 1352 (a)(8).

Second, the State maintains that AFDC families can secure help from legally responsible relatives more easily than recipients under other programs. Assuming again for purposes of discussion that this is true, it should be plain that any support from any relatives is subtracted from the State's grant. Moreover, appellants properly point out that recipients of aid in non-AFDC programs

often have a source of aid unavailable to AFDC recipients—the federal old age insurance, 42 U. S. C. § 201 *et seq.* Thus, there is no substance to this argument.

Third, Texas points to the likelihood of future employment for AFDC recipients, a likelihood that it says is nonexistent for older persons and others who receive aid. Federal law provides that a State may only consider income that is currently available in allocating funds. 45 CFR § 233.20 (a)(3)(ii). This contention is therefore irrelevant.

The State makes only two other arguments. One has already been rejected. Texas urges that the purposes of the federal programs differ, but the history belies this contention. The other is that the numbers of AFDC recipients is rising and this program should therefore bear the burden of monetary limitations. The obvious problem with this argument is that one fundamental purpose of AFDC aid is to enable people to escape the welfare rolls. But, under the Texas system, the aid is presently insufficient, people are unable to escape from dependency, and the rolls become larger. Had Texas not funded AFDC at a lower level than other programs, it is possible that the number of recipients would not have grown so large. The State's argument is a self-fulfilling prophecy on which it cannot rely to penalize AFDC recipients. Furthermore, there is nothing in the federal legislation to indicate that aid is to be reduced in a program merely because the number of beneficiaries of that program increases at a more rapid rate than in other programs. On the contrary, Congress has indicated that increased eligibility for AFDC is desirable, see 42 U. S. C. § 602 (a)(23); *Rosado* v. *Wyman, supra.* It would be extreme irony if AFDC recipients were penalized by a State because their numbers grew in accordance with congressional intent.

The conclusion that I draw from the statutes is that Congress intended equal treatment for all persons similarly situated. Congress left to the States the determination of who was similarly situated by permitting States to determine levels of need. Since Texas has decided that AFDC recipients have precisely the same need as recipients of other social welfare benefits, it is my opinion that the federal legislation requires equal treatment for all.

This conclusion finds support in the legislative history of the 1950 amendments to the social welfare legislation. In those amendments Congress made clear its intent to put AFDC recipients on a par with recipients of other welfare aid.

> "Today more than 1.1 million children under 18 years of age are receiving aid to dependent children through the State-Federal program because one or both of their parents are dead, absent from the home, or incapacitated. These children, regardless of the State in which they now live, will someday find their place in the productive activities of the Nation and, should the necessity arise, will take part in defending our Nation. Many of these children will be seriously handicapped as adults because in childhood they are not receiving proper and sufficient food, clothing, medical attention, and the other bare necessities of life. The national interest requires that the Federal Government provide for dependent children *at least on a par* with its contributions toward the support of the needy aged and blind." S. Doc. No. 208, 80th Cong., 2d Sess., 105 (emphasis added).

Congress recognized that "families with dependent children need as much in assistance payments as do aged and blind persons." *Id.*, at 106. It concluded that

sound national policy was "for the States to provide payments for aid to dependent children comparable to those for the needy aged and blind." *Ibid.* It is evident that Congress rejected the notion that where AFDC recipients had the same need as other welfare beneficiaries, they should get less money. As Senator Benton said on the floor of the Senate:

> "There seems no reasonable basis for such inequitable treatment of mothers and of children by the Federal Government.
>
> "All of us with children know that it costs as much if not more to rear children in health, decency, and self-respect than to maintain an adult. It is surely no less important to make this investment in our future citizens than it is to provide decently for those who have retired. . . ." 96 Cong. Rec. 8813–8814.

In the 1950 amendments, Congress increased the federal funding of AFDC so that its beneficiaries would receive treatment equivalent to that received by beneficiaries of the other federal-state social welfare legislation. Where the needs of the people receiving aid under the various programs differed, Congress recognized that the amount of aid forthcoming should also differ. But where need was determined by the State to be equal for all recipients, Congress intended that all should receive an equal amount of aid. S. Doc. No. 208, 80th Cong., 2d Sess., 108. There is absolutely no indication in any subsequent congressional action that the intent of Congress has changed.

Accordingly, I would reverse the judgment of the District Court and remand the case for formulation of relief consistent with this opinion.

Syllabus

SOCIALIST LABOR PARTY ET AL. *v.* GILLIGAN, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 70–21. Argued March 23, 1972—Decided May 30, 1972

Appellant political party, its officers, and members, attacked the constitutionality of revisions of the Ohio election code made following this Court's decision in *Socialist Labor Party* v. *Rhodes*, 393 U. S. 23, and a provision that a political party execute a loyalty affidavit under oath in order to obtain a ballot position. The District Court, deciding the case on cross-motions for summary judgment on the basis of the pleadings and supporting affidavits, upheld all appellants' challenges except that involving the oath provision. All parties appealed. A revision of the election code made after this Court noted probable jurisdiction mooted all but the oath issue. Appellants, who did not attack the oath provision in *Rhodes* and who have been on the ballot and presumably have complied with that provision since its adoption in 1941, contend that it violates the First Amendment, is impermissibly vague, does not comport with due process, and, since it applies to them and not the two major political parties, violates equal protection. *Held:* The record and pleadings on the one issue not mooted by the supervening legislation (an issue that received scant attention in appellants' complaint and none in the affidavits supporting the cross-motions for summary judgment) are inadequate for resolution of the constitutional questions presented, and in view of the abstract and speculative posture of the case the appeal must therefore be dismissed. *Rescue Army* v. *Municipal Court*, 331 U. S. 549. Pp. 585–589.

318 F. Supp. 1262, appeal dismissed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 589.

Sanford Jay Rosen argued the cause for appellants. With him on the brief were *Melvin L. Wulf*, *Benjamin Sheerer*, and *Jerry Gordon*.

Donald J. Guittar, Assistant Attorney General of Ohio, argued the cause for appellees. With him on the brief were *William J. Brown,* Attorney General, and *Harold C. Heiss.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant Socialist Labor Party has engaged in a prolonged legal battle to invalidate various Ohio laws restricting minority party access to the ballot. Concluding that "the totality of the Ohio restrictive laws taken as a whole" violated the Equal Protection Clause of the Fourteenth Amendment, this Court struck down those laws in *Socialist Labor Party* v. *Rhodes,* 393 U. S. 23, 34 (1968).[1] Following that decision the Ohio Legislature revised the state election code, but the Party was dissatisfied with the revisions and instituted the present suit in 1970.

The Socialist Labor Party, its officers, and members joined as plaintiffs in requesting a three-judge District Court to invalidate on constitutional grounds various sections of the revised election laws of Ohio. The plaintiffs specifically challenged provisions of the Ohio election laws requiring that a party either receive a certain percentage of the vote cast in the last preceding election or else file petitions of qualified electors corresponding to the same percentage; provisions relating to the organizational structure of a party; provisions requiring that a political party elect a specified number of delegates and alternates to a state convention; and provisions requiring a party to be part of a national political party that holds national conventions at which delegates elected in state primaries nominate presidential and vice-

[1] That case was decided together with *Williams* v. *Rhodes,* 393 U. S. 23 (1968).

presidential candidates. In addition, they challenged that part of the Ohio election code requiring a political party to file an affidavit under oath stating in substance that the party is not engaged in an attempt to overthrow the government by force or violence, is not associated with a group making such an attempt, and does not carry on a program of sedition or treason as defined by the criminal law.

The case was decided on cross-motions for summary judgment, the three-judge District Court having before it the complaint and answer of the respective parties, and affidavits filed pursuant to Fed. Rule Civ. Proc. 56. The court ruled on the merits in favor of all of appellants' constitutional challenges to the Ohio election laws except that involving the oath requirement, with respect to which it ruled in favor of the appellees. Both sides appealed to this Court, and we noted probable jurisdiction. 401 U. S. 991 (1971).

Since then, the posture of this litigation has undergone a significant change. On December 23, 1971, the Ohio Legislature enacted Senate Bill No. 460, which embodied an extensive revision of the state election code. Both sides now agree that the passage of this Act renders moot all but one of the issues decided below. The one challenged provision that remains unamended is the State's requirement that a political party execute the above-described affidavit under oath in order to obtain a position on the ballot.

Appellants' 1970 complaint represented a broadside attack against interrelated and allegedly overly restrictive provisions of the Ohio election laws. The three-judge District Court, in its ruling for the appellants on the issues that have now become moot, stated:

> "The 1969 amendments to the election laws merely perpetuate the restrictive laws enacted between 1948 and 1952. The overall effect of these laws

is still to deny to plaintiffs their constitutional right of political association." 318 F. Supp. 1262, 1269–1270 (footnote omitted).

Thus appellants, at the time they filed their 1970 action, were fenced out of the political process by a series of restrictive provisions that prevented them from making any progress toward a position on the ballot as a designated political party. Their challenge was necessarily of a somewhat abstract character, since under their allegations they were able to comply with very few of the provisions regulating access to the ballot. Now, however, with the enactment of a revised election code, the abstract character of the single remaining challenge to the Ohio election procedures stands out all the more.

Appellants did not in their action that came here in 1968 challenge the loyalty oath. Their 1970 complaint respecting the loyalty oath is singularly sparse in its factual allegations. There is no suggestion in it that the Socialist Labor Party has ever refused in the past, or will now refuse, to sign the required oath. There is no allegation of injury that the party has suffered or will suffer because of the existence of the oath requirement.

It is fairly inferable that the absence of such allegations is not merely an oversight in the drafting of a pleading. The requirement of the affidavit under oath was enacted in 1941, 119 Ohio Laws 586, and has remained continuously in force since that date. The Socialist Labor Party has appeared on the state ballot since the law's passage, and, unless the state officials have ignored what appear to be mandatory oath provisions, it is reasonable to conclude that the party has in the past executed the required affidavit.

It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack "a personal stake in the outcome of the controversy." *Baker* v.

Carr, 369 U. S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968). Appellants argue that the affidavit requirement violates the First and Fourteenth Amendments, but their pleadings fail to allege that the requirement has in any way affected their speech or conduct, or that executing the oath would impair the exercise of any right that they have as a political party or as members of a political party. They contend that to require it of them but not of the two major political parties denies them equal protection, but they do not allege any particulars that make the requirement other than a hypothetical burden. Finally, they claim that the required affidavit is impermissibly vague and that its enforcement procedures do not comport with due process. But the record before the three-judge District Court, and now before this Court, is extraordinarily skimpy in the sort of proved or admitted facts that would enable us to adjudicate this claim. Since appellants have previously secured a position on the ballot with no untoward consequences, the gravamen of their claim that it injures them remains quite unclear.

In the usual case in which this Court has passed on the validity of similar oath provisions, the party challenging constitutionality was either unable or unwilling to execute the required oath and, in the circumstances of the particular case, sustained, or faced the immediate prospect of sustaining, some direct injury as a result of the penalty provisions associated with the oath. See, *e. g.*, *Cole* v. *Richardson*, 405 U. S. 676 (1972); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952).

In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 283–285 (1961), the appellants were public school teachers who had been threatened with discharge for their refusal to execute the required oath. The Court held that even though appellants might be able to sign the

required oath in good conscience, the record there indicated that they would still be subject to possible hazards of a perjury conviction by reason of the vagueness of the oath's language. In the present case, however, appellants have apparently signed the oath at previous times, and so far as this record shows they have suffered no injury as a result. The State has never questioned the truth of the affidavit, and appellants' conduct and associations have not been constricted as a result of their having executed the affidavit.

The long and the short of the matter is that we know very little more about the operation of the Ohio affidavit procedure as a result of this lawsuit than we would if a prospective plaintiff who had never set foot in Ohio had simply picked this section of the Ohio election laws out of the statute books and filed a complaint in the District Court setting forth the allegedly offending provisions and requesting an injunction against their enforcement. These plaintiffs may well meet the technical requirement of standing, and they may be parties to a case or controversy, but their case has not given any particularity to the effect on them of Ohio's affidavit requirement.

This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 584 (1947). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. *Id.,* at 574.[2]

[2] Despite the contrary implication in the dissent, see *post,* at 592–593, n. 3, the holding of *Rescue Army* has been applied by this Court to numerous appeals in which no statutory or constitutional impediment to jurisdiction was present. See, *e. g., Cowgill* v. *California,* 396 U. S. 371 (1970) (Harlan, J., concurring); *Atlanta Newspapers, Inc.* v. *Grimes,* 364 U. S. 290 (1960); *Teamsters* v. *Denver Milk Pro-*

We find that the present posture of this case raises just such an obstacle. All issues litigated below have become moot except for one that received scant attention in appellants' complaint and was treated not at all in the affidavits filed in support of the cross-motions for summary judgment. Nothing in the record shows that appellants have suffered any injury thus far, and the law's future effect remains wholly speculative. Notwithstanding the indications that appellants have in the past executed the required affidavit without injury, it is, of course, possible that at some future time they may be able to demonstrate some injury as a result of the application of the provision challenged here. Our adjudication of the merits of such a challenge will await that time. This appeal must be dismissed. *Rescue Army* v. *Municipal Court, supra,* at 585.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The oath required of appellants for political recognition in Ohio is plainly unconstitutional as a denial of

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ducers, Inc., 334 U. S. 809 (1948). Nor has there ever been any suggestion that *Rescue Army* should apply only to appeals from state, rather than federal, courts. See *United States* v. *Fruehauf,* 365 U. S. 146, 157 (1961); *United States* v. *CIO,* 335 U. S. 106, 125–126 (1948) (Frankfurter, J., concurring). See also *Albertson* v. *Millard,* 345 U. S. 242, 245 (1953). Despite this lack of case support, the dissent argues that the *Rescue Army* doctrine should not apply to the present case, since it is an appeal from a federal court judgment pursuant to 28 U. S. C. § 1253, whereas *Rescue Army* was an appeal from a state court judgment pursuant to 28 U. S. C. § 1257. This distinction is evanescent. Under both grants of jurisdiction this Court is obligated to rule upon those properly presented questions that are necessary for decision of the case. But when the issues are not presented with the clarity needed for effective adjudication, appellate review of a federal court judgment is every bit as inappropriate as was review of a state court judgment in *Rescue Army.*

equal protection. Because I believe this a proper case for declaratory relief, I would therefore reverse the judgment below.

In order to "be recognized or be given a place on the ballot in any primary or general election," Ohio requires that members of political parties file a loyalty oath with the Secretary of State. Ohio Rev. Code Ann. § 3517.07 (1960) (see appendix to this opinion). I need not consider the vagueness or overbreadth of the Ohio oath, for my views on that subject have been stated over and over again.[1] For the present case, it is sufficient for my decision that Ohio requires the oath based upon the invidious classification of political allegiance.

An exception from the oath requirement is made for "any political party or group which has had a place on the ballot in each national and gubernatorial election since the year 1900." *Ibid.* It is conceded that this exemption applies only to the Democratic and Republican Parties (see Plaintiffs' Motion for Summary Judgment), and we may properly treat it as if it were written in precisely those terms. See *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Guinn* v. *United States*, 238 U. S. 347 (1915). This exception is thus part of the broader pattern of Ohio's discriminatory preference for the two established political parties. We considered this discrimination before in *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968), and said:

> "No extended discussion is required to establish that the Ohio laws before us give the two old,

[1] *E. g.*, *Cole* v. *Richardson*, 405 U. S. 676, 687 (1972) (dissenting opinion); *W. E. B. DuBois Clubs* v. *Clark*, 389 U. S. 309, 313 (1967) (dissenting opinion); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Nostrand* v. *Little*, 362 U. S. 474, 476 (1960) (dissenting opinion); *First Unitarian Church* v. *Los Angeles*, 357 U. S. 545, 547 (1958) (concurring opinion); *Speiser* v. *Randall*, 357 U. S. 513, 532 (1958) (concurring opinion).

> established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' "

In a separate opinion, I noted, "The Equal Protection Clause of the Fourteenth Amendment permits the States to make classifications and does not require them to treat different groups uniformly. Nevertheless, it bans any 'invidious discrimination.' " *Id.*, at 39. Classifications based upon political or religious associations, beliefs, or philosophy are such "invidious" classifications. As Mr. Justice Black said in *Cox* v. *Louisiana*, 379 U. S. 559, 581:

> "[B]y specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, un-

constitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment."

"While I doubt that any state interest can be so compelling as to justify an impairment of associational freedoms in the area of philosophy—political or otherwise," *Lippitt* v. *Cipollone*, 404 U. S. 1032, 1033–1034 (DOUGLAS, J., dissenting); see also *Williams* v. *Rhodes*, *supra*, at 39–40 (separate opinion of DOUGLAS, J.), the appellees have not even offered a colorable explanation for the disparate treatment of the separate political parties. I conclude, therefore, that the unequal burden placed upon appellants is unconstitutional.[2]

The Court does not reach appellants' challenge to the loyalty oath, however, because it concludes that "they do not allege any particulars that make the [oath] requirement other than a hypothetical burden." *Ante*, at 587. In sharp contrast to the decision in *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947), the only case upon which it relies,[3] the Court does not explain what

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[2] While the District Court acknowledged that one of appellants' challenges to the oath was that it "violates the Equal Protection Clause by excepting the Democratic and Republican Parties from its ambit," 318 F. Supp. 1262, 1270, the court inexplicably did not address this argument.

[3] *Rescue Army* came on appeal from the Supreme Court of California and involved a complex state statutory scheme.

The present case, by contrast, comes from a United States District Court where our appellate jurisdiction is founded upon 28 U. S. C. § 1253. It is, I think, an undue extension of *Rescue Army* to apply it to an appeal from a federal court which properly heard

additional facts it feels are necessary to reach the merits. In basing its decision on this ground, I fear that the Court has taken an unduly narrow view of declaratory relief.

Appellants argue that the oath is facially invalid for the invidious classification it creates, for its overbreadth

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and considered a federal constitutional question. See H. Hart & H. Wechsler, The Federal Courts and the Federal System 149 (1953). Our differing treatment of appeals from federal and state courts relates to the difference between the courts from which the appeals are taken. If an appeal from a state court does not fall within Art. III, it would in nowise affect the jurisdiction of the court from which the appeal was taken. *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952). The same cannot be said, however, of appeals from federal courts, *e. g.*, *Muskrat* v. *United States*, 219 U. S. 346. Thus, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear*, 340 U. S. 36, 39 (1950); see R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court § 273, p. 501 (1951). "If the proceeding is one to review the decision of a state court," however, our practice is to "remand the cause to the state court in order that that court may take such further proceedings as may be deemed appropriate."

The cases cited by the majority, *ante*, at 588–589, n. 2, do not support today's treatment of an appeal from an Art. III court. In *United States* v. *Fruehauf*, 365 U. S. 146 (1961), the District Court dismissed an indictment and we reversed and remanded holding that the provable facts might bring the case within the statute. In *United States* v. *CIO*, 335 U. S. 106 (1948), we affirmed the judgment of the District Court which had dismissed an indictment, because the facts alleged did not state an offense; and we did not therefore reach the constitutional issue relied upon by the District Court. Finally, *Albertson* v. *Millard*, 345 U. S. 242 (1953), was an abstention case in which we vacated the judgment of the District Court and remanded with directions to hold the case until the state law questions had been resolved. None of these cases, therefore, stands for the proposition that we may dismiss a perfected appeal from a properly entered judgment of an Art. III court.

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and its vagueness. Certainly such challenges to the facial validity of a statute are ideally suited for declaratory judgment. *Moore* v. *Ogilvie*, 394 U. S. 814. There can be no question of appellants' stake in the controversy, for if they refuse to subscribe to the oath they will be denied political recognition, cf. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154 (1971); *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971); while, in order to obtain such recognition, they must subscribe to an unconstitutional oath or subject themselves to an invidious classification.[4] Cf. *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961).[5] Under either alternative, appellants have "such a personal stake in the outcome . . . as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Nor is this a case where appellants' injury is only speculative, cf. *Golden* v. *Zwickler*, 394 U. S.

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[4] The suggestion that "appellants have apparently signed the oath at previous times," *ante*, at 588, and thus somehow have waived their right to object to the oath, is unsupported by the record. Appellants include not only the Socialist Labor Party but also its named officers and members who would be required to execute the oath. Whatever relevance there may be to the fact that the Socialist Labor Party was on the ballot in Ohio in 1946, that fact has no bearing with regard to the individual appellants.

[5] As to *Cramp*, it is suggested that "the record there indicated that [Cramp] would still be subject to possible hazards of a perjury conviction by reason of the vagueness of the oath's language." *Ante*, at 588. In our opinion in *Cramp*, however, we noted that Cramp alleged in his complaint "that he 'is a loyal American and does not decline to execute or subscribe to the aforesaid oath for fear of the penalties provided by law for a false oath,'" 368 U. S., at 281. In any event, Ohio also subjects oath takers to the "possible hazards of a perjury conviction," see Ohio Rev. Code Ann. §§ 3599.36, 2917.25 (1960), so *Cramp* is not distinguishable.

103 (1969), for they allege that they "will continue to nominate candidates for political office in Ohio in the future."

Evers v. *Dwyer*, 358 U. S. 202 (1958), is relevant here. The appellant in that case was a black who sought a declaratory judgment that a state statute requiring the segregation of the races on municipal buses was unconstitutional. In dismissing the complaint, the District Court took the approach this Court takes today and reasoned that appellant "ha[d] not been injured at all" because "he was not a regular or even an occasional user of bus transportation." We summarily reversed that decision, saying that an individual "subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability." 358 U. S., at 204. And see *Gooding* v. *Wilson*, 405 U. S. 518.

In *Evers*, we did not base our decision on any consideration of whether the seats blacks were required to take were better or worse than those available to whites. Rather, we held that members of a disfavored minority could challenge unconstitutional statutory classifications which set them apart. That was the "disability" to which we referred. Appellants are members of an unfavored political minority in Ohio and they too should be able to challenge invidious classifications which set them apart from the favored majority.

Since 1946, appellants and other minority political parties in Ohio have been repressed by legislation enacted by the two dominant parties. In the last four years, they have sought relief from these shackles so that their voices could be heard in the political arena.[6] But Ohio

[6] See, *e. g.*, *Lippitt* v. *Cipollone*, 404 U. S. 1032 (1972), aff'g 337 F. Supp. 1405 (ND Ohio 1971); *Brockington* v. *Rhodes*, 396 U. S. 41 (1969); *Williams* v. *Rhodes*, 393 U. S. 23 (1968), aff'g *sub nom.*

has erected innumerable roadblocks to their participation. Under the majority's decision, each obstacle will require a separate lawsuit because it will only be after they have been frustrated at a particular turn that they will be able to satisfy this new test for declaratory relief.

The modern remedy of declaratory judgments should be used to simplify, not multiply, litigation.

I would reverse the judgment below.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Ohio Rev. Code Ann. § 3517.07 (1960):

"No political party or group which advocates, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government or which carries on a program of sedition or treason by radio, speech, or press or which has in any manner any connection with any foreign government or power or which in any manner has any connection with any group or organization so connected or so advocating the overthrow, by force or violence, of our local, state, or national government or so carrying on a program of sedition or treason by radio, speech, or press shall be recognized or be given a place on the ballot in any primary or general election held in the state or in any political subdivision thereof.

"Any party or group desiring to have a place on the ballot shall file with the secretary of state and with the board of elections in each county in which it desires to have a place on the ballot an affidavit made by not less than ten members of such party, not less than

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Socialist Labor Party v. *Rhodes*, 290 F. Supp. 983 (Ohio 1968); *State ex rel. Bible* v. *Board of Elections*, 22 Ohio St. 2d 57, 258 N. E. 2d 227; see also *State ex rel. Beck* v. *Hummel*, 150 Ohio St. 127, 80 N. E. 2d 899.

three of whom shall be executive officers thereof, under oath stating that it does not advocate, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government; that it does not carry on any program of sedition or treason by radio, speech, or press; that it has no connection with any foreign government or power; that it has no connection with any group or organization so connected or so advocating, either directly or indirectly, the overthrow, by force or violence, of our local, state, or national government or so carrying on a program of sedition or treason by radio, speech, or press.

"Said affidavit shall be filed not less than six nor more than nine months prior to the primary or general election in which the party or group desires to have a place on the ballot. The secretary of state shall investigate the facts appearing in the affidavit and shall within sixty days after the filing thereof find and certify whether or not this party or group is entitled under this section to have a place on the ballot.

"Any qualified member of such party or group or any elector of this state may appeal from the finding of the secretary of state to the supreme court of Ohio.

"This section does not apply to any political party or group which has had a place on the ballot in each national and gubernatorial election since the year 1900."

CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE, ET AL. *v.* REMILLARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 70-250. Argued April 10, 1972—Decided June 7, 1972

This is a class action for injunctive and declaratory relief by a child and mother whose husband is away from home on military duty, challenging the validity of California's Department of Social Welfare Regulation EAS § 42-350.11, pursuant to which they had been denied Aid to Families With Dependent Children (AFDC) benefits. Though California incorporates in its AFDC eligibility provisions the "continued absence" concept of the Social Security Act, under which a dependent child "deprived of parental support . . . by reason of [a parent's] continued absence from the home," is deemed eligible for AFDC benefits, EAS § 42-350.11 excludes absence because of military service from the definition of "continued absence." The District Court granted the relief sought. *Held:* Section 402 (a)(10) of the Social Security Act imposes on each State participating in the AFDC program the requirement that benefits "shall be furnished with reasonable promptness to all eligible individuals." Under the Act the eligibility criterion of "continued absence" of a parent from the home means that the parent may be absent for any reason. Consequently, that criterion applies to one who is absent by reason of military service, and California's definition is invalid under the Supremacy Clause. Pp. 600-604.

325 F. Supp. 1272, affirmed.

DOUGLAS, J., delivered the opinion for a unanimous Court. BURGER, C. J., filed a concurring opinion, *post*, p. 604.

Jay S. Linderman, Deputy Attorney General of California, argued the cause for appellants. With him on the brief was *Evelle J. Younger*, Attorney General.

Carmen L. Massey, by appointment of the Court, 405 U. S. 951, argued the cause and filed a brief for appellees *pro hac vice*.

Solicitor General Griswold and *Richard B. Stone* filed a brief for the United States as *amicus curiae* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellees are mother and child. The husband enlisted in the United States Army and served in Vietnam. The mother applied for Aid to Families With Dependent Children (AFDC) benefits at a time when the amount of the monthly allotment she received by virtue of her husband's military service was less than her "need" as computed by the California agency and less than the monthly AFDC grant an adult with one child receives in California. She was denied relief. Although the Social Security Act, 42 U. S. C. §§ 301–1394, grants aid to families with "dependent children," and includes in the term "dependent child" one "who has been deprived of parental support or care by reason of . . . continued absence from the home," 42 U. S. C. § 606 (a), California construed "continued absence" as not including military absence. It is unquestioned that her child is in fact "needy."

When the husband's allotment check was stopped, appellee again applied for AFDC benefits. She again was denied the benefits, this time because California had adopted a regulation [1] which specifically prohibited the payment of AFDC benefits to needy families where the absence of a parent was due to military service.

This action is a class action seeking a declaration of the invalidity of the regulation and an injunction re-

[1] Calif. Dept. Soc. Welfare Reg. EAS § 42-350.11 provides that "continued absence" does not exist:

"When one parent is physically absent from the home on a temporary basis. Examples are visits, trips made in connection with current or prospective employment, active duty in the Armed Services."

straining its enforcement on the ground that it conflicts with the Social Security Act and denies appellees the Fourteenth Amendment rights of due process and equal protection.

A three-judge District Court was convened and by a divided vote granted the relief sought. 325 F. Supp. 1272. The case is here by appeal. 28 U. S. C. §§ 1253, 2101 (b). We noted probable jurisdiction, 404 U. S. 1013.

Section 402 (a)(10) of the Social Security Act, 42 U. S. C. § 602 (a)(10), places on each State participating in the AFDC program the requirement that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." "Eligibility," so defined, must be measured by federal standards. *King* v. *Smith,* 392 U. S. 309. There, we were faced with an Alabama regulation which defined a mother's paramour as a "parent" for § 606 (a)(1) purposes, thus permitting the State to deny AFDC benefits to needy dependent children on the theory that there was no parent who was continually absent from the home. We held that Congress had defined "parent" as a breadwinner who was legally obligated to support his children, and that Alabama was precluded from altering that federal standard. The importance of our holding was stressed in *Townsend* v. *Swank,* 404 U. S. 282, 286:

> "*King* v. *Smith* establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under *federal* AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." (Emphasis supplied.)

In *Townsend,* we also expressly disapproved the Department of Health, Education, and Welfare (HEW)

policy which permitted States to vary eligibility requirements from the federal standards without express or clearly implied congressional authorization. *Ibid.*

Townsend involved § 406 (a)(2)(B) of the Act, 42 U. S. C. § 606 (a)(2)(B), which includes in the definition of "dependent children" those "under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary [of HEW]) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment." Illinois had defined AFDC eligible dependent children to include 18–20-year-old high school or vocational school children but not children of the same age group attending college. We held that § 606 (a)(2)(B) precluded that classification because it varied from the federal standard for needy dependent children. Involved in the present controversy is another eligibility criterion for federal matching funds set forth in the Act, namely the "continued absence" of a parent from the home. If California's definition conflicts with the federal criterion then it, too, is invalid under the Supremacy Clause.

HEW's regulations for federal matching funds provide [2] that:

> "Continued absence of the parent from the home constitutes the reason for deprivation of parental support or care when the parent is out of the home, the nature of the absence is such as either to interrupt or to terminate the parent's functioning as a provider of maintenance, physical care, or guidance for the child, and the known or indefinite duration of the absence precludes counting on the parent's performance of his function in planning for the present support or care of the child. If these con-

[2] 45 CFR § 233.90 (c)(1)(iii).

ditions exist, the parent may be absent for any reason, and he may have left only recently or some time previously."

The Solicitor General advises us that although HEW reads the term "continued absence" to permit the payment of federal matching funds to families where the parental absence is due to military service, it has approved state plans under which families in this category are not eligible for AFDC benefits.[3] HEW has included "service in the armed forces or other military service" as an example of a situation falling under the above definition of "continued absence." HEW Handbook of Public Assistance Administration, pt. IV, § 3422.2.

Our difficulty with that position is that "continued absence from the home" accurately describes a parent on active military duty. The House Report speaks of children "in families lacking a father's support," H. R. Rep. No. 615, 74th Cong., 1st Sess., 10, and the Senate Report refers to "children in families which have been deprived of a father's support." S. Rep. No. 628, 74th Cong., 1st Sess., 17. While the Senate Report noted that "[t]hese are principally families with female heads who are widowed, divorced, or deserted," *ibid.*, it was not stated or implied that eligibility by virtue of a parent's "continued absence" was limited to cases of divorce or desertion.

We agree that "continued absence" connotes, as HEW says, that "the parent may be absent for any reason." We search the Act in vain, moreover, for any authority to make "continued absence" into an accordion-like concept, applicable to some parents because of "continued absence" but not to others.

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[3] The present record reveals that 22 States and the District of Columbia do furnish AFDC benefits to needy families of servicemen, while 19 States and Puerto Rico do not.

The presence in the home of the parent who has the legal obligation to support is the key to the AFDC program, *King* v. *Smith,* 392 U. S., at 327; *Lewis* v. *Martin,* 397 U. S. 552, 559. Congress looked to "work relief" programs and "the revival of private industry" to help the parent find the work needed to support the family. S. Rep. No. 628, *supra,* at 17, and the AFDC program was designed to meet a need unmet by depression-era programs aimed at providing work for breadwinners. *King* v. *Smith, supra,* at 328. That need was the protection of children in homes without such a breadwinner. *Ibid.* It is clear that "military orphans" are in this category, for, as stated by the Supreme Court of Washington, a man in the military service

> "has little control over his family's economic destiny. He has no labor union or other agency to look to as a means of persuading his employer to pay him a living wage. He is without access to collective bargaining or any negotiating forum or other means of economic persuasion, or even the informal but concerted support of his fellow employees. He cannot quit his job and seek a better paying one. . . . [T]here is no action he could lawfully take to make his earnings adequate while putting in full time on his job. His was a kind of involuntary employment where legally he could do virtually nothing to improve the economic welfare of his family." *Kennedy* v. *Dept. of Public Assistance,* 79 Wash. 2d 728, 732–733, 489 P. 2d 154, 157.

Stoddard v. *Fisher,* 330 F. Supp. 566, held a Maine regulation invalid under the Supremacy Clause which denied AFDC aid where the father was continually absent because of his military service. Judge Coffin said:

> "We cannot help but note the irony of a result which would deny assistance to the family of a

man who finds that family disqualified from receiving AFDC on the ground that he has removed himself from the possibility of receiving public work relief by voluntarily undertaking, for inadequate compensation, the defense of his country." *Id.*, at 571 n. 8.

We cannot assume here, anymore than we could in *King* v. *Smith, supra,* that while Congress "intended to provide programs for the economic security and protection of *all* children," it also "intended arbitrarily to leave one class of destitute children entirely without meaningful protection." 392 U. S., at 330. We are especially confident Congress could not have designed an Act leaving uncared for an entire class who became "needy children" because their fathers were in the Armed Services defending their country.

We hold that there is no congressional authorization for States to exclude these so-called military orphans from AFDC benefits. Accordingly we affirm the judgment of the three-judge court.

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I join in the opinion and judgment of the Court, but on the assumption, not expressly articulated in the opinion, that a State may administratively deduct from its total "need payment" such amount as is being paid to the dependents under the military allotment system. It would be curious, indeed, if two "pockets" of the same government would be required to make duplicating payments for welfare.

The administrative procedures to give effect to this process may be cumbersome, but the right of the State to avoid overlapping benefits for support should be clearly understood.

BROOKS *v.* TENNESSEE

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

No. 71–5313. Argued March 21–22, 1972—Decided June 7, 1972

1. Tennessee's statutory requirement that a defendant in a criminal proceeding "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case" violates the defendant's privilege against self-incrimination. A defendant may not be penalized for remaining silent at the close of the State's case by being excluded from the stand later in the trial. Pp. 607–612.
2. The Tennessee rule also infringes the defendant's constitutional rights by depriving him of the "guiding hand of counsel," in deciding not only whether the defendant will testify but, if so, at what stage. Pp. 612–613.

— Tenn. App. —, — S. W. 2d —, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, WHITE, MARSHALL, and POWELL, JJ., joined. STEWART, J., filed a statement concurring in the judgment and in Part II of the Court's opinion, *post*, p. 613. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 613. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 617.

Jerry H. Summers argued the cause and filed a brief for petitioner.

Robert E. Kendrick, Deputy Attorney General of Tennessee, argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was tried and convicted in the Circuit Court of Hamilton County, Tennessee, on charges of armed robbery and unlawful possession of a pistol. During the

trial, at the close of the State's case, defense counsel moved to delay petitioner's testimony until after other defense witnesses had testified. The trial court denied this motion on the basis of Tenn. Code Ann. § 40–2403 (1955), which requires that a criminal defendant "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case." [1] Although the prosecutor agreed to waive the statute, the trial court refused, stating that "the law is, as you know it to be, that if a defendant testifies he has to testify first." The defense called two witnesses, but petitioner himself did not take the stand.

Following the denial of his motion for new trial, petitioner appealed his conviction to the Tennessee Court of Criminal Appeals, which overruled his assignments of error, including his claim that § 40–2403 violated the State and Federal Constitutions. The Supreme Court of Tennessee denied review, and we granted certiorari to consider whether the requirement that a defendant testify first violates the Federal Constitution. 404 U. S. 955 (1971). We reverse.

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[1] Section 40–2403 was first enacted in 1887 as part of a Tennessee statute that provided that criminal defendants were competent to testify on their own behalf. That statute appears in the Tennessee Code Annotated as follows:

"§ 40–2402. Competency of defendant. In the trial of all indictments, presentments, and other criminal proceedings, the party defendant thereto may, at his own request, but not otherwise, be a competent witness to testify therein.

"§ 40–2403. Failure of defendant to testify—Order of testimony. The failure of the party defendant to make such request and to testify in his own behalf, shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case."

I

The rule that a defendant must testify first is related to the ancient practice of sequestering prospective witnesses in order to prevent their being influenced by other testimony in the case. See 6 J. Wigmore, Evidence § 1837 (3d ed. 1940). Because the criminal defendant is entitled to be present during trial, and thus cannot be sequestered, the requirement that he precede other defense witnesses was developed by court decision and statute as an alternative means of minimizing this influence as to him. According to Professor Wigmore, "[t]he reason for this rule is the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than to veracity, so as to meet the necessities as laid open by prior witnesses . . . ." *Id.*, at § 1869.

Despite this traditional justification, the validity of the requirement has been questioned in a number of jurisdictions as a limitation upon the defendant's freedom to decide whether to take the stand. Two federal courts have rejected the contention, holding that a trial court does not abuse its discretion by requiring the defendant to testify first. *United States* v. *Shipp*, 359 F. 2d 185, 189–190 (CA6 1966); *Spaulding* v. *United States*, 279 F. 2d 65, 66–67 (CA9 1960). In *Shipp*, however, the dissenting judge strongly objected to the rule, stating:

> "If the man charged with crime takes the witness stand in his own behalf, any and every arrest and conviction, even for lesser felonies, can be brought before the jury by the prosecutor, and such evidence may have devastating and deadly effect, although unrelated to the offense charged. The decision as to whether the defendant in a criminal case shall take

> the stand is, therefore, often of utmost importance, and counsel must, in many cases, meticulously balance the advantages and disadvantages of the prisoner's becoming a witness in his own behalf. Why, then, should a court insist that the accused must testify before any other evidence is introduced in his behalf, or be completely foreclosed from testifying thereafter? . . . This savors of judicial whim, even though sanctioned by some authorities; and the cause of justice and a fair trial cannot be subjected to such a whimsicality of criminal procedure." 359 F. 2d, at 190–191.

Other courts have followed this line of reasoning in striking down the rule as an impermissible restriction on the defendant's freedom of choice. In the leading case of *Bell* v. *State*, 66 Miss. 192, 5 So. 389 (1889), the court held the requirement to be reversible error, saying:

> "It must often be a very serious question with the accused and his counsel whether he shall be placed upon the stand as a witness, and subjected to the hazard of cross-examination, a question that he is not required to decide until, upon a proper survey of all the case as developed by the state, and met by witnesses on his own behalf, he may intelligently weigh the advantages and disadvantages of his situation, and, thus advised, determine how to act. Whether he shall testify or not; if so, at what stage in the progress of his defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or direction of the presiding judge. Control as to either is coercion, and coercion is denial of freedom of action." *Id.*, at 194, 5 So., at 389.

In *Nassif* v. *District of Columbia*, 201 A. 2d 519 (DC Ct. App. 1964), the court adopted the language and

reasoning of *Bell* in concluding that the trial court had erred in applying the rule.

Although *Bell*, *Nassif*, and the *Shipp* dissent were not based on constitutional grounds, we are persuaded that the rule embodied in § 40–2403 is an impermissible restriction on the defendant's right against self-incrimination, "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964). As these opinions demonstrate, a defendant's choice to take the stand carries with it serious risks of impeachment and cross-examination; it "may open the door to otherwise inadmissible evidence which is damaging to his case," *McGautha* v. *California*, 402 U. S. 183, 213 (1971), including, now, the use of some confessions for impeachment purposes that would be excluded from the State's case in chief because of constitutional defects. *Harris* v. *New York*, 401 U. S. 222 (1971). Although "it is not thought inconsistent with the enlightened administration of criminal justice to require the defendant to weigh such pros and cons in deciding whether to testify," *McGautha* v. *California*, *supra*, at 215, none would deny that the choice itself may pose serious dangers to the success of an accused's defense.

Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of their own they may fail to impress the jury as honest and reliable witnesses. In addition, a defendant is sometimes compelled to call a hostile prosecution witness as his own.[2] Unless the State pro-

[2] The instant case is an apt illustration. After the State had rested, defense counsel requested permission to call the local chief

vides for discovery depositions of prosecution witnesses, which Tennessee apparently does not,[3] the defendant is unlikely to know whether this testimony will prove entirely favorable.

Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed. Yet, under the Tennessee rule, he cannot make that choice "in the unfettered exercise of his own will." Section 40–2403 exacts a price for his silence by keeping him off the stand entirely unless he chooses to testify first.[4] This, we think, casts a heavy burden on a defendant's otherwise unconditional right not to take the

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of police as a hostile witness, and to cross-examine him about the circumstances surrounding petitioner's lineup. Because the police chief had not testified, though he was subpoenaed by the State, the trial court denied the motion, ruling that the chief will "be your witness if you call him."

[3] Tenn. Code Ann. § 40–2428 provides:

"The accused may, by order of the court, have the depositions of witnesses taken in the manner prescribed for taking depositions in civil cases, on notice to the district attorney."

However, a recent decision by the Tennessee Court of Criminal Appeals holds that this statute does not give the defendant in a criminal case the right to take a discovery deposition. *Craig* v. *State*, — Tenn. App. —, 455 S. W. 2d 190 (1970).

[4] The failure to testify first not only precludes any later testimony by defendant concerning new matters, but may also preclude testimony offered in rebuttal of State's witnesses. *Arnold* v. *State*, 139 Tenn. 674, 202 S. W. 935 (1918), holds that a defendant may testify in rebuttal if he has testified first on direct. According to the parties, there is no Tennessee case holding that a defendant who does not testify first may later take the stand in rebuttal.

stand.[5] The rule, in other words, "cuts down on the privilege [to remain silent] by making its assertion costly." *Griffin* v. *California*, 380 U. S. 609, 614 (1965).[6]

Although the Tennessee statute does reflect a state interest in preventing testimonial influence, we do not regard that interest as sufficient to override the defendant's right to remain silent at trial.[7] This is not to imply that there may be no risk of a defendant's coloring his testimony to conform to what has gone before. But our adversary system reposes judgment of the credibility of all witnesses in the jury. Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty. It fails to take into account the

[5] That burden is not lightened by the fact that Tennessee courts also require the chief prosecuting witness to testify first for the State if he chooses to remain in the courtroom after other witnesses are sequestered. *Smartt* v. *State*, 112 Tenn. 539, 80 S. W. 586 (1904). Despite its apparent attempt at symmetry, this rule does not restrict the prosecution in the same way as the defense, for the State has a certain latitude in designating its prosecuting witness, choosing for example between the victim of the crime and the investigating officer. A more fundamental distinction, of course, is that the State, through its prosecuting witness, does not share the defendant's constitutional right not to take the stand. Thus, the choice to present the prosecuting witness first or not at all does not raise a constitutional claim secured to the State, as it does in the situation of the defendant.

[6] The dissenting opinions suggest that there can be no violation of the right against self-incrimination in this case because Brooks never took the stand. But the Tennessee rule imposed a penalty for petitioner's initial silence, and that penalty constitutes the infringement of the right.

[7] It is not altogether clear that the State itself regards the interest as more than minimally important. It has long been the rule in Tennessee that the statute may be waived, see *Martin* v. *State*, 157 Tenn. 383, 8 S. W. 2d 479 (1928), and an offer of waiver was made by the prosecutor in this case, though not accepted by the trial court.

very real and legitimate concerns that might motivate a defendant to exercise his right of silence. And it may compel even a wholly truthful defendant, who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination at a time when the strength of his other evidence is not yet clear. For these reasons we hold that § 40–2403 violates an accused's constitutional right to remain silent insofar as it requires him to testify first for the defense or not at all.

II

For closely related reasons we also regard the Tennessee rule as an infringement on the defendant's right of due process as defined in *Ferguson* v. *Georgia,* 365 U. S. 570 (1961). There the Court reviewed a Georgia statute providing that a criminal defendant, though not competent to testify under oath, could make an unsworn statement at trial. The statute did not permit defense counsel to aid the accused by eliciting his statement through questions. The Court held that this limitation deprived the accused of " 'the guiding hand of counsel at every step in the proceedings against him,' *Powell* v. *Alabama,* 287 U. S. 45, 69, within the requirement of due process in that regard as imposed upon the States by the Fourteenth Amendment." *Id.,* at 572. The same may be said of § 40–2403. Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of

the "guiding hand of counsel" in the timing of this critical element of his defense. While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand.

Petitioner, then, was deprived of his constitutional rights when the trial court excluded him from the stand for failing to testify first. The State makes no claim that this was harmless error, *Chapman* v. *California*, 386 U. S. 18 (1967), and petitioner is entitled to a new trial.

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART joins Part II of the opinion, and concurs in the judgment of the Court.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

This case is an example of the Court's confusing what it does not approve with the demands of the Constitution. As a matter of choice and policy—if I were a legislator, for example—I would not vote for a statute like that the Court strikes down today. But I cannot accept the idea that the Constitution forbids the States to have such a statute.

Of course, it is more convenient for a lawyer to defer the decision to have the accused take the stand until he knows how his other witnesses fare. By the same token, it is helpful for an accused to be able to adjust his testimony to what his witnesses have had to say on the matter. No one has seriously challenged the absolute discretion of a trial judge to exclude witnesses, other than the accused, from the courtroom until they are called to the

stand. The obvious purpose is to get honest testimony and minimize the prospect that a witness will adjust and "tailor" his version to fit what others have said; it seems somewhat odd to say the Constitution forbids all States to require the accused to give his version before his other witnesses speak, since it is not possible to exclude him from the courtroom, as is the common rule for witnesses who are not parties.

The Court's holding under the Fifth Amendment is admittedly unsupported by any authority and cannot withstand analysis. The Constitution provides only that no person shall "be compelled in any criminal case to be a witness against himself." It is undisputed that petitioner was not in fact compelled to be a witness against himself, as he did not take the stand. Nor was the jury authorized or encouraged to draw perhaps unwarranted inferences from his silence, as in *Griffin* v. *California*, 380 U. S. 609 (1965). Petitioner was clearly not subjected to the obvious compulsion of being held in contempt for his silence, as in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), nor did the Tennessee procedure subject him to any other significant compulsion to testify other than the compulsion faced by every defendant who chooses not to take the stand—the knowledge that in the absence of his testimony the force of the State's evidence may lead the jury to convict. Cases such as *Spevack* v. *Klein*, 385 U. S. 511 (1967), and *Gardner* v. *Broderick*, 392 U. S. 273 (1968), involving loss of employment or disbarment are therefore clearly inapposite. That should end the matter.

However, the Court distorts both the context and content of *Malloy* v. *Hogan*, *supra*, at 8, by intimating that the Fifth Amendment may be violated if the defendant is forced to make a difficult choice as to whether to take the stand at some point in time prior to the con-

clusion of a criminal trial. But, as the Court pointed out only last Term in *McGautha* v. *California*, 402 U. S. 183 (1971), "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.*, at 213. Indeed, the "choice" we sustained in *McGautha* was far more difficult than that here, as the procedure there clearly exerted considerable force to compel the defendant to waive the privilege and take the stand in order to avoid the possible imposition of the death penalty. See also *Williams* v. *Florida*, 399 U. S. 78 (1970). There is no such pressure here. The majority's rationale would lead to the absurd result that the State could not even require the defendant to finally decide whether he wishes to take the stand prior to the time the jury retires for deliberations, for, even at that point, he "may not know . . . whether his own testimony will be necessary or even helpful to his cause." Even then, he might "prefer to remain silent . . . putting off his testimony until its value can be realistically assessed." In short, even at the close of the defense case, his decision to take the stand is not unfettered by the difficulty to make the hard choice to waive the privilege. Perhaps the defendant's decision will be easier at the close of all the evidence. Perhaps not. The only "burden" cast on the defendant's choice to take the stand by the Tennessee procedure is the burden to make the choice at a given point in time. That the choice might in some cases be easier if made later is hardly a matter of constitutional dimension.

The Court's holding that the Tennessee rule deprives the defendant of the "guiding hand of counsel" at every stage of the proceedings fares no better, as MR. JUSTICE REHNQUIST clearly demonstrates. It amounts to nothing more than the assertion that counsel may not be

restricted by ordinary rules of evidence and procedure in presenting an accused's defense if it might be more advantageous to present it in some other way. A rule forbidding defense counsel to ask leading questions of the defendant when he takes the stand may restrict defense counsel in his options and may in many cases bear only remote relationship to the goal of truthful testimony. Yet no one would seriously contend that such a universal rule of procedure is prohibited by the Constitution. The rule that the defendant waives the Fifth Amendment privilege as to any and all relevant matters when he decides to take the stand certainly inhibits the choices and options of counsel, yet this Court has never questioned such a rule and reaffirmed its validity only last Term. See *McGautha* v. *California*, 402 U. S., at 215. Countless other rules of evidence and procedure of every State may interfere with the "guiding hand of counsel." The Court does not explain why the rule here differs from those other rules.

Perhaps this reflects what is the true, if unspoken, basis for the Court's decision; that is, that in the majority's view the Tennessee rule is invalid because it is followed presently by only two States in our federal system. But differences in criminal procedures among our States do not provide an occasion for judicial condemnation by this Court.

This is not a case or an issue of great importance, except as it erodes the important policy of allowing diversity of method and procedure to the States to the end that they can experiment and innovate, and retreat if they find they have taken a wrong path. Long ago, Justice Brandeis spoke of the need to let "a single courageous State" try what others have not tried or will not try. *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (dissenting opinion); see *Fay* v. *New York*, 332 U. S. 261,

296 (1947) (Jackson, J.). In the faltering condition of our machinery of justice this is a singularly inappropriate time to throttle the diversity so essential in the search for improvement.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The Court's invalidation of the Tennessee statute challenged here is based upon both its stated repugnance to the privilege against self-incrimination and its infringement of counsel's right to plan the presentation of his case.

While it is possible that this statute regulating the order of proof in criminal trials might in another case raise issues bearing on the privilege against self-incrimination, its application in this case certainly has not done so. Petitioner Brooks never took the stand, and it is therefore difficult to see how his right to remain silent was in any way infringed by the State. Whatever may be the operation of the statute in other situations, petitioner cannot assert that it infringed *his* privilege against self-incrimination—a privilege which he retained inviolate throughout the trial.

The Court's alternative holding that the Tennessee statute infringes the right of petitioner's counsel to plan the presentation of his case creates a far more dominant role for defense counsel than that indicated by the language of the Constitution. While cases such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), establish the fundamental nature of the constitutional right to the assistance of counsel, no case previously decided by this Court elevates defense counsel to the role of impresario with respect to decisions as to the order in which witnesses shall testify at the trial.

This Court and other courts have repeatedly held that the control of the order of proof at trial is a matter primarily entrusted to the discretion of the trial court. See, *e. g., Thiede* v. *Utah Territory,* 159 U. S. 510, 519 (1895); *Nelson* v. *United States,* 415 F. 2d 483, 487 (CA5 1969), cert. denied, 396 U. S. 1060 (1970); *Horowitz* v. *Bokron,* 337 Mass. 739, 151 N. E. 2d 480 (1958); *Small* v. *State,* 165 Neb. 381, 85 N. W. 2d 712 (1957). The notion that the Sixth Amendment allows defense counsel to overrule the trial judge as to the order in which witnesses shall be called stands on its head the traditional understanding of the defendant's right to counsel. Defense counsel sits at the side of the accused, not to take over the conduct of the trial, but to advise the accused as to various choices available to him within the limits of existing state practice and procedure.

I could understand, though I would not agree with, a holding that under these circumstances the Fourteenth Amendment conferred a right upon the defendant, counseled or not, to decide at what point during the presentation of his case to take the stand. But to cast the constitutional issue in terms of violation of the defendant's right to counsel suggests that defense counsel has an authority of constitutional dimension to determine the order of proof at trial. It is inconceivable to me that the Court would permit every preference of defense counsel as to the order in which defense witnesses were to be called to prevail over a contrary ruling of the trial judge in the exercise of his traditional discretion to control the order of proof at trial. The crucial fact here is not that *counsel* wishes to have a witness take the stand at a particular time, but that the *defendant*—whether advised by counsel or otherwise—wishes to determine at what point during the presentation of his case *he* desires to take the stand. Logically the benefit of today's ruling should be available to a defendant con-

ducting his own defense who has waived the right of counsel, but since the Court insists on putting the issue in terms of the advice of counsel, rather than in terms of defense control over the timing of defendant's appearance, the application of today's holding to that situation is by no means clear.

The Tennessee statute in question is, as the Court notes in its opinion, based upon an accommodation between the traditional policy of sequestering prospective witnesses before they testify and the right of the criminal defendant to be present during his trial. Since the defendant may not be sequestered against his will while other witnesses are testifying, the State has placed a more limited restriction on the presentation of his testimony. The defendant is required to testify, if he chooses to do so, as the first witness for the defense. The State applies the same rule evenhandedly to the prosecuting witness, if there be one; he, too, must testify first. While it is perfectly true that the prosecution is given no constitutional right to remain silent, this fact does not detract from the evident fairness of Tennessee's effort to accommodate the two conflicting policies.

The state rule responds to the fear that interested parties, if allowed to present their own testimony after other disinterested witnesses have testified, may well shape their version of events in a way inconsistent with their oath as witnesses. This fear is not groundless, nor is its importance denigrated by vague generalities such as the statement that "our adversary system reposes judgment of the credibility of all witnesses in the jury." *Ante*, at 611. Assuredly the traditional common-law charge to the jury confides to that body the determination as to the truth or falsity of the testimony of each witness. But the fact that the jury is instructed to make such a determination in reaching its verdict has never been thought to militate against

the desirability, to say nothing of the constitutionality, of additional inhibitions against perjury during the course of a trial. The traditional policy of sequestering nonparty witnesses, the requirement of an oath on the part of all witnesses, and the opportunity afforded for cross-examination of witnesses are but examples of such inhibitions. As a matter of constitutional judgment it may be said that the effectuation of this interest has been accomplished by Tennessee at too high a price, but the importance of the interest itself cannot rationally be dispelled by loose assertions about the role of the jury.

In view of the strong sanction in history and precedent for control of the order of proof by the trial court, I think that Tennessee's effort here to restrict the choice of the defendant as to when he shall testify, in the interest of minimizing the temptation to perjury, does not violate the Fourteenth Amendment. I would therefore affirm the judgment below.

Syllabus

FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–1016. Argued April 19, 1972—Decided June 7, 1972*

When United Gas Pipe Line Co. (United), a jurisdictional pipeline, experienced temporary shortages of natural gas supply forcing it to reduce deliveries to its contract customers, the Federal Power Commission (FPC) asserted its jurisdiction to effect a reasonable curtailment plan covering deliveries to both direct-sales customers and purchasers for resale. While curtailment proceedings were pending before the FPC, Louisiana Power & Light Co. (LP&L), a direct-sales customer of United, brought this action in the District Court against United, seeking to enjoin curtailment of deliveries to LP&L's plants pursuant to any FPC-promulgated plans, including any under FPC Order No. 431. LP&L also sought to enjoin United from seeking FPC certification of United's previously intrastate deliveries through its Green System. The FPC intervened, asserting that both matters were pending before it and any decision by the District Court would therefore invade its primary jurisdiction. The District Court dismissed the action, holding that the FPC had jurisdiction of both proceedings and that LP&L had to exhaust its administrative remedies. The Court of Appeals reversed, holding that the FPC lacked jurisdiction to curtail deliveries to direct-sales customers, since Section 1 (b) of the Natural Gas Act makes the Act applicable only to sales for resale. The Court of Appeals also reversed the District Court's decision on the Green System, holding that the system was wholly intrastate. *Held:*

1. The FPC has power to regulate curtailment of direct interstate sales of natural gas under the head of its "transportation" jurisdiction in § 1 (b), and the prohibition in the proviso clause of that provision withheld from FPC only rate-setting authority with respect to such sales. Pp. 631–647.

2. The FPC had primary jurisdiction to determine whether the Green System was subject to its authority, and the Court of Ap-

*Together with No. 71–1040, *United Gas Pipe Line Co. et al.* v. *Louisiana Power & Light Co. et al.*, on certiorari to the same court.

peals erred in deciding that question. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Pp. 647–648.

456 F. 2d 326, reversed.

BRENNAN, J., delivered the opinion of the Court, in which all members joined except STEWART, J., who took no part in the decision of the cases, and POWELL, J., who took no part in the consideration or decision of the cases.

Gordon Gooch argued the cause for petitioner in No. 71–1016. With him on the briefs were *Solicitor General Griswold, Samuel Huntington, Leo E. Forquer, J. Richard Tiano,* and *George W. McHenry. William C. Harvin* argued the cause for petitioners in No. 71–1040. With him on the briefs were *William R. Choate, Perry O. Barber, Jr., Jeron Stevens, W. DeVier Pierson,* and *William B. Cassin.*

Andrew P. Carter argued the cause for respondent Louisiana Power & Light Co. With him on the brief was *Thomas W. Leigh.*

Briefs of *amici curiae* urging reversal were filed by *J. Lee Rankin, Stanley Buchsbaum,* and *Francis I. Howley* for the City of New York; by *Peter H. Schiff* for the Public Service Commission for the State of New York; by *J. Evans Attwell, Christopher T. Boland, Robert O. Koch, John J. Mullally,* and *William W. Brackett* for the Pipeline Intervenors; by *Howard E. Wahrenbrock* and *John M. Kuykendall, Jr.,* for Mobile Gas Service Corp. et al.; by *Barbara M. Gunther* for Brooklyn Union Gas Co.; and by *Richard A. Rosan* and *Daniel L. Bell, Jr.,* for Columbia Gas Transmission Corp.

Briefs of *amici curiae* urging affirmance were filed by *John J. McKeithen,* Governor, *Jack P. F. Gremillion,* Attorney General, *Fred G. Benton, Sr.,* and *Arnold D. Berkeley* for the State of Louisiana; by *Pat Moran* for the Arkansas Public Service Commission; by *Martin N.*

Erck, John R. Rebman, Kirby Ellis, Sherman S. Poland, and *Daniel F. Collins* for Humble Oil & Refining Co.; by *Thomas G. Johnson* for Shell Oil Co.; and by *J. Donald Annett, Kirk W. Weinert,* and *John M. Young* for Texaco Inc.

Briefs of *amici curiae* were filed by *Albert G. Norman, Jr., John W. Hinchey,* Assistant Attorney General of Georgia, *John E. Holtzinger, Jr.,* and *Allen E. Lockerman* for Atlanta Gas Light Co. et al., and by *John T. Miller, Jr.,* for Monsanto Co. et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In April 1971 the Federal Power Commission (FPC) promulgated its Order No. 431 requiring every jurisdictional pipeline to report to the FPC whether curtailment of its deliveries to customers would be necessary because of inadequate supply of natural gas. A pipeline anticipating the necessity for curtailment was required to file a revised tariff to control deliveries to *all* customers—industrial "direct sales" customers, purchasing gas for their own consumption, and "resale" customers, purchasing gas for distribution to ultimate consumers.

The principal question here is whether the proviso to § 1 (b) of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717, prohibits the FPC from applying its Order No. 431 to curtail direct-sales deliveries in times of natural gas shortage. Section 1 (b) provides:

> "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other trans-*

portation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Emphasis supplied.)

A subsidiary question presented is whether the doctrine of primary jurisdiction obliged the federal courts in this case to defer to the FPC for an initial determination of FPC jurisdiction to certificate a particular pipeline delivery when a certification proceeding to determine that question was pending before the Commission.

The Court of Appeals for the Fifth Circuit held that the proviso of § 1 (b) prohibited application of FPC curtailment regulations to direct sales deliveries, and held, further, that neither that court nor the District Court was obliged to defer to the FPC's pending certification proceeding. 456 F. 2d 326 (CA5 1972). We granted certiorari, 405 U. S. 973 (1972). We reverse.

I

Respondent Louisiana Power & Light Co. (LP&L) generates electricity at Sterlington-Electric Generating Station in Ouachita Parish, Louisiana, and at Nine-Mile Point Generating Station in Jefferson Parish, Louisiana. The natural gas burned under LP&L's boilers at both stations is purchased from United Gas Pipe Line Co. (United), a petitioner in No. 71–1040, under direct-sales contracts of long standing. The sales to Sterlington Station are sales of interstate gas, initially certificated by the FPC. Sales to Nine-Mile Point Station had been wholly intrastate gas delivered from United's intrastate "Green System" when, in 1970, United diverted 2.6% of the gas from its interstate "Black System" into the intrastate "Green System," after which United sought FPC certification of the "Green System." In 1970 also, United, from concern that its gas supply

during the 1970–1971 heating season would fall short of demand, sought a declaratory order from the FPC to approve a proposed program of curtailment of natural gas deliveries to both its direct and resale customers. This proceeding culminated in agreement among affected customers under which FPC allowed United to carry out its program for the 1970–1971 winter.

When, however, United made a supplemental filing in February 1971, for a proposed curtailment program for the 1971 summer season, LP&L, in March 1971, filed this diversity action in the District Court for the Western District of Louisiana, alleging that the program was a breach of its contracts with United and asking injunctive relief against its implementation. LP&L also asked for a judgment declaring that the "Green System" was an intrastate system, deliveries from which did not require FPC certification. The FPC and United sought dismissal of the action on the ground that a prior decision by the District Court would be destructive of the FPC's primary jurisdiction since the FPC was, in fact, asserting its jurisdiction over both issues at that time and was promulgating its Order No. 431, and United, in response to Order No. 431, was filing its third curtailment plan.

In opposition to the motions to dismiss in the District Court, LP&L argued that the FPC was without jurisdiction to authorize or approve curtailment programs affecting direct-sales deliveries and was also without jurisdiction to curtail deliveries to Nine-Mile Point Station because they were local and not interstate deliveries. On June 30, 1971, the District Court dismissed the action, holding that the FPC had jurisdiction of both curtailment and certification proceedings and that LP&L had to exhaust its administrative remedies in both, 332 F. Supp. 692 (1971). The Court of Appeals decision reversed this dismissal.

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II

United is a "jurisdictional" pipeline [1] purchasing gas from producers in Texas and Louisiana and supplying wholesalers, direct-sales customers, and other pipelines. United supplies ultimate consumers throughout the eastern half of the United States from Texas to Massachusetts with a peak-day commitment in the winter heating months totaling about 6,000,000 thousand cubic feet (Mcf).

In 1970, as part of a pattern of temporary and chronic natural gas shortages throughout the Nation,[2] United found itself unable to meet all of its contract commitments during peak demand periods.[3] Indeed, on

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[1] A "jurisdictional" pipeline transports natural gas in interstate commerce and for that reason is subject to FPC certification jurisdiction. The "jurisdictional" label is also sometimes used to apply to sales, in which case it refers to interstate sales for resale, which are subject to Commission rate regulation.

[2] FPC Staff Report No. 2, National Gas Supply and Demand 1971–1990 (1972):

"The emergence of a natural gas shortage during the past two years marks a historic turning point—the end of natural gas industry growth uninhibited by supply considerations. Not only has the Nation's proven gas reserve inventory for the lower 48 states been shrinking for the past three years, but major pipeline companies and distributors in most parts of the country have been forced to refuse requests for additional gas service from large industrial customers and from many new customers. For practical short-term purposes we are confronted with the fact that current proven reserves in the lower 48 states, as reported by the American Gas Association, have dropped from 289.3 trillion cubic feet in 1967 to 259.6 in 1970, a 10.3 percent drop within a three-year period. Furthermore, approximately 95 percent of this proven reserve inventory is already committed to gas sales contracts and is therefore unavailable for sales to new customers or for increased volumes to old customers." *Id.*, at xi.

[3] Demand for natural gas fluctuates sharply from season to season and from day to day. Nationally, peak days occur in winter heating

days of greatest use, United expected to fall short by as much as 20% or more.[4] In October 1970 United first promulgated a proposed delivery curtailment plan and sought a declaratory order from the FPC that the plan was consistent with United's obligations under its tariff and direct-sales contracts.[5] Many of United's contracts with its customers made some provision for curtailment in times of temporary shortage, but these terms were complex and were not identical in all contracts or in United's tariff filings with the Commission.[6] United's proposed curtailment plan established a priority system of three groups, curtailed on the basis of end use. These three groups were, in order of the lowest priority and curtailed first, gas used for industrial purposes, including gas to generate electricity for industrial purposes; gas used to generate electricity consumed by domestic consumers; and gas used by domestic consumers. See *United Gas Pipe Line Co.*, F. P. C. Op. No. 606, Oct. 5, 1971. The plan made no distinction between direct-sales customers and resale customers.

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months. For LP&L, however, the need for gas is greatest in the summer months, when air conditioning increases electricity consumption.

[4] Many of the facts are taken from the recitals in the petitions for certiorari, which draw upon evidence presented before the FPC in the curtailment proceedings. LP&L has not challenged their accuracy except to argue that no significant gas shortage actually exists. Our decision in this case in no way limits LP&L's freedom to argue its position as to the facts on the appeal pending in the Court of Appeals.

[5] The Commission has authority to issue declaratory orders under the Administrative Procedure Act, 5 U. S. C. § 554 (e).

[6] The record in these cases does not contain all the contract terms dealing with curtailment of deliveries. United's two contracts with LP&L under consideration in this litigation, however, indicate that the terms vary from year to year and customer to customer since these two contracts themselves establish slightly different priority systems. Moreover, LP&L informs us that its contracts had terms slightly different from those in most other direct-sales contracts.

This plan was opposed by LP&L and others, primarily on the ground that the FPC had no jurisdiction to curtail deliveries under direct-sales contracts. While preserving their objections, all but one of United's customers [7] agreed to a modified plan to go into effect for the 1970–1971 winter season while the proceedings continued.

During this same season, many other pipelines reported serious shortages and applied to the FPC for assistance in effecting curtailment plans. In response, the FPC promulgated several emergency provisions for temporary measures to avoid major disruptions of power supplies. Orders Nos. 402, 35 Fed. Reg. 7511, and 402A, 35 Fed. Reg. 8927, authorized short-term purchases by pipelines facing shortages from other jurisdictional pipelines to ensure that storage fields were filled. Order No. 418, 35 Fed. Reg. 19173, authorized similar emergency purchases from producers without following usual procedures.

It was because these measures were found to be insufficient that the FPC promulgated Order No. 431, 36 Fed. Reg. 7505. The Order recommended that in filing the required tariff revisions, "[c]onsideration should be given to the curtailment of volumes equivalent to all interruptible sales and to the curtailment of large boiler fuel sales where alternate fuels are available." Finally, Order No. 431 provided:

> "Jurisdictional pipelines have the responsibility in the first instance to adopt a curtailment program by filing appropriate tariffs. Such tariffs, if approved by the Commission, will control in all respects notwithstanding inconsistent provisions in sales contracts, jurisdictional and nonjurisdictional, entered into prior to the date of the approval of the tariff."

[7] The objecting party appealed the decision of the FPC and that case is now pending in the District of Columbia.

United's revised tariff program filed in compliance with this order immediately became subject to the pending hearing for a declaratory order. On October 5, 1971, the FPC announced its interim decision, Op. No. 606, finding jurisdiction to effect a curtailment program for all customers, revising United's latest filing slightly, and remanding other issues in the plan to a hearing examiner. On November 2, 1971, United's plan, as modified, went into full effect. The appeal of LP&L and others from the FPC decision, Op. No. 606, is pending in the Court of Appeals for the Fifth Circuit.[8]

Also, in October 1970, based on the introduction of the interstate gas from its Black System, United sought certification under § 7 (c) [9] for the continued operation of the portion of its pipeline facilities in Louisiana (the Green System) used to supply LP&L's Nine-Mile Point generating station. LP&L opposed the application, alleging that the pipeline was constructed and operated to be wholly intrastate, and that United's "illegal" introduction of a very small quantity of interstate gas did not cause the whole system to come under Commission jurisdiction.

On February 9, 1972, the Commission found in Op. No. 610 that the Green System was within its jurisdiction and thus required certification; it remanded the

[8] The petitions of the Solicitor General and United for review here of the FPC decision prior to judgment of the Court of Appeals were denied. 405 U. S. 973 (1972).

[9] Section 7 (c) provides:

"No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ." 15 U. S. C. § 717f (c).

proceedings to a trial examiner to determine if the certificate should be granted under the "public convenience and necessity" standard of § 7.

The Court of Appeals' reversal of the District Court [10] on the curtailment issue rested on its view that under the Natural Gas Act ". . . FPC has no form of continuing certificate jurisdiction over direct sales to customers of interstate pipeline companies. It has the initial right to issue or veto a certificate of public convenience and necessity and it must give its approval to the abandonment of the use of the certificated facilities, but between the two functions the express exemption [in the proviso of § 1 (b)] of regulatory power over such consumptive sales bars agency intervention." 456 F. 2d, at 338.

The Court of Appeals' holding that United's injection of interstate gas from its Black System into the theretofore intrastate Green System did not establish FPC jurisdiction to certificate the Green System, rested on its finding that the record showed that "the flow of gas from the Black system into the Green system in the case at bar is occasional and irregular, as well as minimal. The Green system, as an entire and separate unit, is physically located and functions entirely in Louisiana. Therefore, the undisputed facts show that the channel of constant flow is an intrastate and not an interstate channel. The regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction." 456 F. 2d, at 339-340.

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[10] Argument was heard in the Fifth Circuit in November 1971, one month after the FPC decision in No. 606. The Court of Appeals decision was announced in January 1972, one month before the FPC decision in No. 610.

III

The Natural Gas Act of 1938 granted FPC broad powers "to protect consumers against exploitation at the hands of natural gas companies." *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610 (1944). See *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 19 (1961); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U. S. 137, 147 (1960). To that end, Congress "meant to create a comprehensive and effective regulatory scheme," *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 520 (1947), of dual state and federal authority. Although federal jurisdiction was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no "gaps" for private interests to subvert the public welfare. This congressional blueprint has guided judicial interpretation of the broad language defining FPC jurisdiction, and

> "when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare *Guss* v. *Utah Labor Board*, 353 U. S. 1. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." *FPC* v. *Transcontinental Gas Pipe Line Corp.*, *supra*, at 19–20.

This litigation poses the question whether FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale. LP&L insists that

the FPC has no power to include direct sales in these plans. *Transcontinental* counsels inquiry into the necessary consequences of that contention in terms of the scope of federal and state regulatory authority in the premises.

Thirty-seven percent of United's total sales in 1970 were direct industrial sales. Under LP&L's argument, this volume would be wholly exempt from any curtailment plan approved by the FPC and thus United's resale customers would be forced to accept the entire burden of sharply reduced volumes while direct-sales customers received full contract service. The ultimate consumers thus affected include schools, hospitals, and homes completely dependent on a continued natural gas supply for heating and other domestic uses. These resale consumers could be curtailed by as much as 560,000 Mcf on cold days without dire consequences, but burdening them with the full curtailment volume would deprive them of up to 1,500,000 Mcf.

From a practical point of view, LP&L's position may thus produce a seriously inequitable system of gas distribution. Many direct industrial users of gas require only "interruptible services," which by the terms of their contracts are recognized to be of such minimal importance to the user that, upon the happening of certain events, the supply can be shut off on little or no notice. Nevertheless, the need for curtailment may not be sufficient to trigger these provisions of the contract and interruptible service customers may be able to demand full contract gas while resale consumers are being drastically curtailed. Many other direct industrial sales customers have alternative means available at little or no additional cost, yet under LP&L's contention will be able to demand their contract volumes while homes, hospitals, and schools suffer from lack of adequate service.

Can state authority practicably regulate in this area to prevent this inequity and hardship? Insofar as state

plans purport to curtail deliveries of interstate gas, *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), is authority that such plans, when they operate to withdraw a large volume of gas from an established interstate current whereby it is supplied to customers in other States, would constitute a prohibited interference with interstate commerce. But even to the extent the States may constitutionally promulgate curtailment plans, the inevitable result would be varied regulatory programs of state courts and agencies, interpreting a countless number of different contracts and applying a variety of state agency rules. The conflicting results would necessarily produce allocations determined simply by the ability of each customer to pump its desired volume from a pipeline. Moreover, in some States, Louisiana for example, the state regulatory agency is forbidden to regulate direct-sales contracts.[11] Besides, a state agency empowered to regulate these contracts would be obliged to regulate in the State, not the national interest.[12] Cf. *Pennsylvania* v. *West Virginia*, *supra*. The unavoidable conflict between producing

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[11] La. Const., Art. 6, § 4.

[12] The conflict between producing and consuming States over state or federal regulatory authority is highlighted in the contrast between Louisiana's *amicus* brief in this litigation and the statement of the Chairman of the New York Public Service Commission in another case. Louisiana, a producing State, submits:

"Historically, gas producing states have certain advantages over states which do not have their own gas supply. Their very proximity to the source of production attracts industries which use gas as the raw material without which their plants could not operate. The lower transportation costs of delivering gas to other industrial and commercial users within the state makes its use particularly attractive for such applications. It is not surprising, therefore, that producing states have a higher proportion of industrial-commercial consumption of total gas consumed and of firm gas than consuming states. Louisiana utilizes 84% of the total quantity of firm gas sold

States and consuming States will create contradictory regulations that cannot possibly be equitably resolved by the courts. With these problems in mind, the de-

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in the state for industrial and power plant generation purposes, in comparison to a national average of only 37%.

"Louisiana's economy is heavily dependent upon the availability of a firm, reliable and uninterrupted supply of natural gas. Statewide investment by industrial category clearly reflects the predominance of petroleum, refineries and chemicals which represented $465,297,370 or 76% of a total industrial investment of $609,578,850 in 1970. Apart from these industries which use natural gas as process gas without which their plants cannot function, the state's electric utilities are completely dependent upon natural gas as fuel for electric generators.

"Thus, the economic welfare of the state hinges upon the continued delivery of the volumes of gas it received and used prior to United's curtailment and upon the ability to draw upon greater volumes. Otherwise, its economy will be frozen at or below its present level. This is not true of other states in which natural gas plays a subsidiary rather than a dominant role in the overall economy of the state and in which the electrical utilities have alternate power sources such as coal, imported liquefied natural gas and inexpensive hydroelectric power." Brief of State of Louisiana *Amicus Curiae* 2–3.

As observed in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1 (1961), consuming States prefer federal regulation. The Chairman of the New York Public Service Commission summed up this position in *In re Cabot Gas Corp.*, 16 P. U. R. (N. S.) 443 (1936):

"There can be but one opinion among those who believe in the conservation of natural resources. They should be developed not to benefit a few individuals but in the interests of public welfare present and future. Our natural gas resources ought to be conserved and there is probably no field where the Federal government acting in the interests of the entire country and to protect the welfare of the future could accomplish more than in the natural gas industry. From a conservation viewpoint, I thoroughly agree with Commissioner Burritt, and if I could see how a denial of the present petition would work to this end, I would vote to refuse the application; but will such denial produce the desired results?

"The field from which gas is to be taken by the petitioner is in

sirability of uniform federal regulation is abundantly clear. Nevertheless, as the Court of Appeals emphasized, 456 F. 2d, at 335, a *need* for federal regulation

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northern Pennsylvania and southern New York. Apparently, far more of the gas will come from Pennsylvania than from New York and over the extraction of gas in the state of Pennsylvania, this Commission has practically no control. It is possible for Pennsylvania companies to take all of the gas from this field unless the New York companies remove the gas before the field is exhausted.

"Further, the Public Service Commission has been given no adequate authority to determine how the natural gas resources of this state, to say nothing of the resources of Pennsylvania, shall be developed. We have no powers directly to control the amount of gas that is taken from any field and our indirect powers are so limited that it is doubtful if much could be accomplished. The state of New York receives far more gas from sources located beyond its boundaries than it exports to any adjoining state and the conservation of natural gas resources in the various states cannot be properly brought about except through voluntary action of the states or by the Federal government. Neither one is yet operative and while attention has been given to electric interstate commerce, no effective steps have been taken to conserve or regulate the distribution of natural gas, where it is so urgently needed.

"In view of the lack of authority conferred upon this Commission to conserve natural resources, the question becomes primarily what will be gained to consumers in the state of New York if the petition is denied. It is stated that about 80 or 90 per cent of the gas furnished by the petitioner will be used for industrial purposes and that only from 10 to 20 per cent will go to the general public, the inference being that the saving to the companies purchasing the gas will go to enrich a few stockholders. Let us assume such are the facts. Who will gain if those benefited by the petition are deprived of their profits or advantages by a denial of the petition? This Commission does not control the use that will be made of the gas from the field tapped by the petitioner. There are many other companies tapping the supply and we have no means of determining where, when, or to whom the gas will be sold. If restriction is imposed on the use of it in New York, it may go to Pennsylvania; and if the petitioner is not allowed to supply the areas which it is proposed to serve, the gas will go to other areas and there is no assurance that it

does not establish FPC jurisdiction that Congress has not granted. We turn then to analysis of the statute to determine whether Congress withheld, as LP&L argues, authority from the FPC to apply its curtailment regulations to direct sales.

IV

In § 1 (b) of the Act, "[t]hree things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S., at 516. Each of these is an independent grant of jurisdiction and, though the Act's application to "sales" is limited to sales of interstate gas for resale, the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale. *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464, 468 (1950).[13]

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will be used any more beneficially from a public viewpoint than it will be if the petition is granted.

"As stated, I am heartily in favor of the conservation of natural gas as well as other natural resources; but in this specific case, will the granting or the denial of the petition work to the benefit of the people of New York? The benefit to the area to be supplied by the petitioner is definite, it is known, it is sure. But if the petition is denied, who will be benefited? There is no assurance upon this point. The answer is speculative and uncertain. There is nothing to assure us that the denial of the petition would conserve the gas supply. Is it not likely that the benefits would merely be diverted from one group or one locality to another?"

[13] *East Ohio* dealt with the grant of FPC jurisdiction over natural gas companies engaged in interstate transportation or sale. What we said there has relevance to the issue in this case:

"Respondents contend, however, that the word 'transportation'

LP&L argues that the proviso in § 1 (b) creates a complete exemption of direct sales from curtailment regulations.[14] The answer is that the prohibition of

in § 1 (b) must be construed as applying only to companies engaged in the business of transporting gas in interstate commerce for hire or for sales to be followed by resales, whereas East Ohio does neither. The short answer is that the Act's language did not express any such limitation. Despite the unqualified language of § 1 (b) making the Act apply to 'transportation of natural gas in interstate commerce,' respondents ask us to qualify that language by applying it only to businesses which both transport and sell natural gas for resale. They rely on a sentence in the declaration of policy, § 1 (a), referring to 'the business of transporting and selling natural gas.' But their contention that the word 'and' in the policy provision creates an unseverable bond is completely refuted by the clearly disjunctive phrasing of § 1 (b) itself. As we pointed out in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 516, § 1 (b) made the Natural Gas Act applicable to three separate things: '(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transporation or sale.' And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation. They have independent and equally important places in the Act. Thus, to adopt respondents' construction would unduly restrict the Commission's power to carry out one of the major policies of the Act. Moreover, the initial interest of Congress in regulation of transportation facilities was reemphasized in 1942 by passage of an amendment to § 7 (c) of the Act broadening the Commission's powers over the construction or extension of pipe lines. 56 Stat. 83. This amendment followed a report of the Commission to Congress pointing out that without amendment the Act vested the Commission with inadequate power to make 'any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources.' We hold that the word 'transportation' like the phrase 'interstate commerce' aptly describes the movements of gas in East Ohio's high-pressure pipe lines." 338 U. S. 464, 468–469 (1950) (footnotes omitted).

[14] It is well established that the proviso was added to the Act merely for clarification and was not intended to deprive FPC of any jurisdiction otherwise granted by § 1 (b). *FPC* v. *Transcontinental*

the proviso of § 1 (b) withheld from FPC only *rate-setting* authority with respect to direct sales. Curtailment regulations are not *rate-setting* regulations but regulations of the "transportation" of natural gas and thus within FPC jurisdiction under the opening sentence of § 1 (b) that "[t]he provisions of this Act shall apply to the transportation of natural gas in interstate commerce . . . ." The Court of Appeals rejected that construction on the ground that under it the "transportation" jurisdiction would swallow up the proviso's exemption for direct sales. We disagree.

The major impetus for the congressional grant of sales jurisdiction to the FPC was furnished by a Federal Trade Commission study of the pipeline industry in 1935–1936.[15] The study showed that increasing concentration in the industry was producing vast economic power for the pipelines and a serious threat of unreasonably high prices for consumers. This threat was most acute in the case of sales for resale because wholesale distributors and their customers had little economic clout with which to obtain equitable prices from the pipelines. State power to regulate rates charged for interstate service to a customer in another State for resale was also thought, within this Court's decisions, constitutionally to be outside the regulatory power of the

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Gas Pipe Line Co., 365 U. S. 1 (1961); *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464 (1950). The House report on the bill described this second sentence of § 1 (b) as follows:

"The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill." H. R. Rep. No. 709, 75th Cong., 1st Sess., 3 (1937).

[15] S. Doc. No. 92, pt. 84–A, 70th Cong., 1st Sess., submitted Dec. 31, 1935.

States. *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83 (1927); *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298 (1924).

In response to this report and pressures from state regulatory agencies, Congress enacted a federal "sales" jurisdiction in the Natural Gas Act, by which Congress granted *rate-setting* authority to the Commission over all interstate sales for resale. But as this Court, in *Pennsylvania Gas Co.* v. *Public Service Comm'n*, 252 U. S. 23 (1920), had sustained state authority to regulate rates for "direct" sales, and, moreover, the need for federal authority here was not deemed acute, Congress withheld *rate-setting* jurisdiction over direct sales. That rate setting was the only subject matter covered by "sales" jurisdiction and the "direct sales" exception is clear from the legislative history of the proviso. The original phrasing of the proviso was:

> "*Provided*, That nothing in this Act shall be construed to authorize the Commission *to fix rates or charges* for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only." Hearing on H. R. 11662 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., 1 (1936) (emphasis supplied).

The phrasing was changed and the words "to fix rates or charges" were subsequently deleted, but the House committee report confirms that the proviso as finally phrased was nevertheless meant to be restricted to *rate setting*. H. R. Rep. No. 709, 75th Cong., 1st Sess., 4 (1937), states:

> "It was urged in connection with earlier bills that there should be inserted at the end of this subsection a proviso as follows:
>
> "'*Provided*, That nothing in this Act shall be construed to authorize the Commission to fix the rates

or charges to the public for the sale of natural gas distributed locally.'

"In order to avoid misunderstanding the committee thought it necessary to omit this proviso from the present bill for the following reasons, even though there is entire agreement with the intended policy which would have prompted its inclusion: First, it would have been surplusage if interpreted as it was intended to be interpreted, and, second, it would have been, in all likelihood, a source of confusion if interpreted in any other way. For example, it was felt that in the effort to find a reason for its inclusion it might have been argued that it exempted sales to a publicly owned distributing company, and such an exemption is not, of course, intended. *It is believed that the purposes of this proviso, assuming the need for any such provision, are fully covered in the present provision by the language—'but shall not apply to any other . . . sales of natural gas.'*" (Emphasis supplied.)

The author of the changed version, the General Solicitor of the National Association of Railroad and Utilities Commissioners, confirmed this interpretation. Hearing on H. R. 4008, before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., 143.

Thus, Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate setting*, and in no wise limited the broad base of "transportation" jurisdiction granted the FPC. That head of jurisdiction plainly embraces regulation of the quantities of gas that pipelines may transport, for in that respect Congress created "a comprehensive and effective regulatory scheme," *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S., at 520, to "afford consumers a complete, permanent and effective bond of protection . . . ." *At-*

lantic Refining Co. v. *Public Service Comm'n,* 360 U. S. 378, 388 (1959).

> "Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than non-regulation." *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U. S., at 28.

Comprehensive and equitable curtailment plans for gas transported in interstate commerce, as already mentioned, are practically beyond the competence of state regulatory agencies. Congress was also aware that *Pennsylvania* v. *West Virginia,* 262 U. S. 553 (1923), casts serious doubt upon the constitutionality of state regulation of such plans. That decision was considered in the deliberations on the Natural Gas Act and was cited to the House Committee as a reason for federal regulation. Hearing on H. R. 11662 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., 14 (1936).

Finally, this Court has already stated its view that curtailment plans are aspects of FPC's "transportation" and not its "sales" jurisdiction. In *Panhandle Eastern,* 332 U. S., at 523, we said:

> "[T]he matter of interrupting service is one largely related . . . to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." [16]

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[16] In *Panhandle,* the Court was asked to hold that direct industrial sales customers receiving gas in interstate commerce could not be subjected to state regulatory control consistently with FPC jurisdiction in the area. In support of this position, the customers

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V

Since curtailment programs fall within the FPC's responsibilities under the head of its "transportation" jurisdiction, the Commission must possess broad powers to devise effective means to meet these responsibilities. FPC and other agencies created to protect the public interest must be free, "within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility in providing that:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. . . ." 15 U. S. C. § 717*o*.

In applying this section, we have held that "the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." *Permian Basin Area Rate Cases*, 390 U. S. 747, 776 (1968); see *United Gas Pipe Line Co.* v. *FPC*, 385 U. S. 83, 89–90 (1966).

The substantive standard governing FPC evaluation of curtailment plans is found in § 4 (b) of the Act:

> "No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or

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argued that state control of certain matters affecting the sales could not practically be managed by state regulation. Not surprisingly, the problem of curtailment was used as a prime example of a matter presenting these difficulties.

> grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 U. S. C. § 717c (b).

Two procedural mechanisms are available to enforce this antidiscriminatory provision of § 4 (b). As to a tariff already on file and in effect, the FPC may proceed under § 5 (a).[17] The § 5 (a) procedure has substantial disadvantages, however, rendering it unsuitable for the evaluation of curtailment plans. The FPC must afford interested parties a full hearing on the reasonableness of the tariff before taking any remedial action, and, as we have observed, "the delay incident to determination in § 5 proceedings through which initial certificated rates [as well as "practices" and "contracts"] are reviewable appears nigh interminable." *Atlantic Refining Co.* v.

[17] Section 5 (a) provides:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 U. S. C. § 717d (a).

Public Service Comm'n, 360 U. S., at 389.[18] In addition a prescribed remedial order can have only prospective application. FPC has therefore chosen to process curtailment plans under §§ 4 (c), (d), and (e).[19]

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[18] Of course, even when conducting a § 5 hearing, the Commission would have emergency authority to issue interim orders effecting a curtailment plan. *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942).

[19] These sections provide,

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

"(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

"(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and

Under these provisions, a pipeline's tariff amendments filed with the FPC go into effect in 30 days unless suspended by the Commission. If a filing is challenged or the FPC of its own motion deems it appropriate, it may suspend the amended tariff for up to five months, at the end of which time the amended tariff becomes effective pending the completion of hearings. In these hearings, the pipeline has the burden of proving that its plan is reasonable and fair.

Order No. 431 makes full use of the § 4 procedures. All pipelines facing shortages necessitating curtailment are required to file reasonable allocation schemes as amendments to their existing tariffs, or to state that the existing tariffs are adequate. When emergency or other conditions arise and it appears desirable in the public interest to place a plan into effect, the FPC may accept the filing, implement it immediately or suspend it, and employ the plan as a working guideline while hearings continue. In addition to the flexibility of this arrangement, the requirement that pipelines submit plans enables the FPC to utilize each pipeline's unique knowledge of its customers' needs, ability to substitute other fuel sources, and other relevant considerations.

The Court of Appeals held that, under our decision in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S., at 17, FPC authority over direct-sales contracts is limited to a "veto power" to be exercised only in certification proceedings under § 7 (c) and abandonment

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the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect." 15 U. S. C. §§ 717c (c), (d), and (e).

proceedings under § 7 (b). We reject this argument on two grounds. First, *Transcontinental* dealt with FPC's authority to consider direct-sales *rates* in certification proceedings. We there noted that under § 1 (b) FPC jurisdiction *over rates* was limited. The litigation here, unlike *Transcontinental*, does not involve rates and therefore the provision of § 1 (b) is wholly inapplicable. Secondly, *Transcontinental* dealt only with FPC "veto power" under § 7, and in no way limited FPC authority under § 4 (b) to prevent discrimination among a pipeline's customers. Since § 4 (b) deals with "service," the FPC may invoke it to deal with curtailment programs, whether or not it could also invoke § 7 for that purpose.

Amici have argued that permitting the pipeline's tariff amendments to take effect despite contrary terms in existing contracts is inconsistent with our decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956). In that case, however, we dealt with an attempt by a pipeline *unilaterally* to effect a change in its contract terms by making a filing under § 4. In the present cause, the issue is whether the FPC, acting under the head of its transportation jurisdiction and its broad mandate under § 16, may order pipelines facing shortages to develop and submit rational curtailment arrangements. Our holding in *Mobile Gas Service Corp.* does not govern the decision of this issue since, as we observed in that case:

> "[D]enying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest." 350 U. S., at 344.

We conclude therefore that the FPC has the jurisdiction asserted here and that the Natural Gas Act fully authorizes the method chosen by the FPC for its exercise.

VI

In addition to holding that the proviso to § 1 (b) prohibited curtailment of gas delivered to the Nine-Mile Point Station, the Court of Appeals held that those deliveries were not regulable by the FPC because "the flow of gas from the Black system into the Green system . . . is occasional and irregular, as well as minimal," and that "[t]he Green system, as an entire and separate unit, is physically located and functions entirely in Louisiana"; the court concluded that, for these reasons, "[t]he regulation of the Green system is substantially and essentially a localized matter committed to Louisiana's jurisdiction." 456 F. 2d, at 339–340. The Court of Appeals erred in deciding this question. The FPC had exercised its primary jurisdiction and was conducting proceedings to determine whether the Green System was subject to its jurisdiction. In that circumstance, the District Court and the Court of Appeals were obliged to defer to the FPC for the initial determination of its jurisdiction. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). The need to protect the primary authority of an agency to determine its own jurisdiction "is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the [agency]. While the [agency's] decision is not the last word, it must assuredly be the first." *Marine Engineers Beneficial Assn.* v. *Interlake S. S. Co.*, 370 U. S. 173, 185 (1962). Review of the FPC decision may proceed in due course pursuant to § 19 (b) of the Act, 15 U. S. C. § 717r (b). We see no need to make the same disposition as to the

curtailment question since the Court of Appeals had Op. No. 606 before it and acted upon the opinion in reaching its decision.

Reversed.

MR. JUSTICE STEWART took no part in the decision of these cases.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

Syllabus

UNITED STATES ET AL. *v.* MIDWEST VIDEO CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-506. Argued April 19, 1972—Decided June 7, 1972

The Federal Communications Commission (FCC) promulgated a rule that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting [*i. e.*, originating programs] and has available facilities for local production and presentation of programs other than automated services." Upon challenge of respondent, an operator of CATV systems subject to the new requirement, the Court of Appeals set aside the regulation on the ground that the FCC had no authority to issue it. *Held:* The judgment is reversed. Pp. 659–675.

441 F. 2d 1322, reversed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that:

1. The rule is within the FCC's statutory authority to regulate CATV at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 178. Pp. 659–670.

2. In the light of the record in this case, there is substantial evidence that the rule, with its 3,500 standard and as it is applied under FCC guidelines for waiver on a showing of financial hardship, will promote the public interest within the meaning of the Communications Act of 1934. Pp. 671–675.

THE CHIEF JUSTICE concluded that until Congress acts to deal with the problems brought about by the emergence of CATV, the FCC should be allowed wide latitude. Pp. 675–676.

BRENNAN, J., announced the Court's judgment and delivered an opinion in which WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the result, *post*, p. 675. DOUGLAS, J., filed a dissenting opinion, in which STEWART, POWELL, and REHNQUIST, JJ., joined, *post*, p. 677.

Deputy Solicitor General Wallace argued the cause for the United States et al. With him on the briefs were *Solicitor General Griswold, Richard B. Stone, John W. Pettit,* and *Edward J. Kuhlmann.*

Harry M. Plotkin argued the cause for respondent. With him on the brief were *Wayne W. Owen, George H. Shapiro,* and *David Tillotson.*

Briefs of *amici curiae* urging affirmance were filed by *William J. Scott,* Attorney General, *Peter A. Fasseas,* Special Assistant Attorney General, and *Roland S. Homet, Jr.,* for the State of Illinois; by *Paul Rodgers* for the National Association of Regulatory Utility Commissioners; and by *Melvin L. Wulf* for the American Civil Liberties Union.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join.

Community antenna television (CATV) was developed long after the enactment of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.,* as an auxiliary to broadcasting through the retransmission by wire of intercepted television signals to viewers otherwise unable to receive them because of distance or local terrain.[1] In *United States* v. *Southwestern Cable Co.,* 392 U. S. 157 (1968), where we sustained the jurisdiction of

[1] "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers." *United States* v. *Southwestern Cable Co.,* 392 U. S. 157, 161 (1968). They "perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.,* at 163.

the Federal Communications Commission to regulate the new industry, at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *id.*, at 178, we observed that the growth of CATV since the establishment of the first commercial system in 1950 has been nothing less than " 'explosive.' " *Id.*, at 163.[2] The potential of the new industry to augment communication services now available is equally phenomenal.[3] As we said in *Southwestern*, *id.*, at 164, CATV "[promises] for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country." Moreover, as the Commission has noted, "the expanding multichannel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community," such as facsimile reproduction of documents, electronic mail delivery, and information retrieval. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F. C. C. 2d 417, 419–420 (1968). Perhaps more important, CATV systems can themselves originate programs, or "cablecast"—which means, the Commission has found, that CATV can "[increase] the number of local outlets for community self-expression and [augment] the public's choice of programs and types of service, without use of broadcast spectrum . . . ." *Id.*, at 421.

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[2] There are now 2,678 CATV systems in operation, 1,916 CATV franchises outstanding for systems not yet in current operation, and 2,804 franchise applications pending. Weekly CATV Activity Addenda, 12 Television Digest 9 (Feb. 28, 1972).

[3] For this reason the Commission has recently adopted the term "cable television" in place of CATV. See Report and Order on Cable Television Service; Cable Television Relay Service, 37 Fed. Reg. 3252 n. 9 (1972) (hereinafter cited as Report and Order on Cable Television Service).

Recognizing this potential, the Commission, shortly after our decision in *Southwestern*, initiated a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology . . . ." *Id.*, at 417. In particular, the Commission tentatively concluded, as part of a more expansive program for the regulation of CATV,[4] "that, for now and in general, CATV program origination is in the public interest," *id.*, at 421, and sought comments on a proposal "to condition the carriage of television broadcast signals (local or distant) upon a requirement that the CATV system also operate to a significant extent as a local outlet by origi-

[4] The early regulatory history of CATV, canvassed in *Southwestern*, need not be repeated here, other than to note that in 1966 the Commission adopted rules, applicable to both microwave and non-microwave CATV systems, to regulate the carriage of local signals, the duplication of local programing, and the importation of distant signals into the 100 largest television markets. See *infra*, at 659. The Commission's 1968 notice of proposed rulemaking addressed, in addition to the program origination requirement at issue here, whether advertising should be permitted on cablecasts and whether the broadcast doctrines of "equal time," "fairness," and sponsorship identification should apply to them. Other areas of inquiry included the use of CATV facilities to provide common carrier service; federal licensing and local regulation of CATV; cross-ownership of television stations and CATV systems; reporting and technical standards; and importation of distant signals into major markets. The notice offered concrete proposals in some of these areas, which were acted on in the Commission's First Report and Order, 20 F. C. C. 2d 201 (1969) (hereinafter cited as First Report and Order), and Report and Order on Cable Television Service. See also Memorandum Opinion and Order, 23 F. C. C. 2d 825 (1970) (hereinafter cited as Memorandum Opinion and Order). None of these regulations, aside from the cablecasting requirement, is now before us, see n. 14, *infra*, and we, of course, intimate no view on their validity.

nating." *Id.*, at 422. As for its authority to impose such a requirement, the Commission stated that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies." *Ibid.*

On the basis of comments received, the Commission on October 24, 1969, adopted a rule providing that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent [5] as a local outlet by cablecasting [6] and has available facilities for local production and presentation of programs other

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[5] "By significant extent [the Commission indicated] we mean something more than the origination of automated services (such as time and weather, news ticker, stock ticker, etc.) and aural services (such as music and announcements). Since one of the purposes of the origination requirement is to insure that cablecasting equipment will be available for use by others originating on common carrier channels, 'operation to a significant extent as a local outlet' in essence necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programing (e. g., a camera and a video tape recorder, etc.)." First Report and Order 214.

[6] "Cablecasting" was defined as "programing distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." 47 CFR § 74.1101 (j). As this definition makes clear, cablecasting may include not only programs produced by the CATV operator, but "films and tapes produced by others, and CATV network programing." First Report and Order 214. See also *id.*, at 203. The definition has been altered to conform to changes in the regulation, see n. 7, *infra*, and now appears at 47 CFR § 76.5 (w). See Report and Order on Cable Television Service 3279. Although the definition now refers to programing "subject to the exclusive control of the cable operator," this is apparently not meant to effect a change in substance or to preclude the operator from cablecasting programs produced by others. See *id.*, at 3271.

than automated services." 47 CFR § 74.1111 (a).[7] In a report accompanying this regulation, the Commission stated that the tentative conclusions of its earlier notice of proposed rulemaking

> "recognize the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . . They also reflect our view that a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services,[8] might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created: 'regulating interstate and foreign commerce in com-

[7] This requirement, applicable to both microwave and nonmicrowave CATV systems without any "grandfathering" provision, was originally scheduled to go into effect on January 1, 1971. See First Report and Order 223. On petitions for reconsideration, however, the effective date was delayed until April 1, 1971, see Memorandum Opinion and Order 827, 830, and then, after the Court of Appeals decision below, suspended pending final judgment here. See 36 Fed. Reg. 10876 (1971). Meanwhile, the regulation has been revised and now appears at 47 CFR § 76.201 (a). The revision has no significance for this case. See Memorandum Opinion and Order 827, 830 (revision effective Aug. 14, 1970); Report and Order on Cable Television Service 3271, 3277, 3287 (revision effective Mar. 31, 1972).

[8] Although the Commission did not impose common-carrier obligations on CATV systems in its 1969 report, it did note that "the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels." First Report and Order 209. Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of common-carrier service. See *id.*, at 3277.

> munication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges . . .' (sec. 1 of the Communications Act).[9] After full consideration of the comments filed by the parties, we adhere to the view that program origination on CATV is in the public interest." [10] First Report and Order, 20 F. C. C. 2d 201, 202 (1969).

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[9] Section 1 of the Act, 48 Stat. 1064, as amended, 47 U. S. C. § 151, states:

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

[10] In so concluding, the Commission rejected the contention that a prohibition on CATV originations was "necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service." First Report and Order 202. "[B]roadcasters and CATV originators . . . ," the Commission reasoned, "stand on the same footing in acquiring the program material with which they compete." *Id.*, at 203. Moreover, "a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service," *ibid.*—an impact that the Commission found had no support in the record and that, in any event, it

The Commission further stated, *id.*, at 208–209:

> "The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radio in the public interest' (sec. 303 (g)).[11] The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities (sec. 307 (b)),[12] in areas where we have been unable to accomplish this through broadcast media." [13]

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would undertake to prevent should the need arise. See *id.*, at 203–204. See also Memorandum Opinion and Order 826 n. 3, 828–829.

[11] Section 303 (g), 48 Stat. 1082, 47 U. S. C. § 303, states that "[e]xcept as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall" "(g) [s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . . ."

[12] Section 307 (b), 48 Stat. 1084, as amended, 47 U. S. C. § 307 (b), states:

"In considering applications for licenses [for the transmission of energy, communications, or signals by radio], and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

[13] The Commission added: "[I]n authorizing the receipt, forwarding, and delivery of broadcast signals, the Commission is in effect authorizing CATV to engage in radio communication, and may condition this authorization upon reasonable requirements governing activities which are closely related to such radio communication and facilities." First Report and Order 209 (citing, *inter alia*,

Upon the challenge of respondent Midwest Video Corp., an operator of CATV systems subject to the new cablecasting requirement, the United States Court of Appeals for the Eighth Circuit set aside the regulation on the ground that the Commission "is without authority to impose" it. 441 F. 2d 1322, 1328 (1971).[14] "The Commission's power [over CATV] . . . ," the court explained, "must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsi-

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§ 301 of the Communications Act, 48 Stat. 1081, 47 U. S. C. § 301 (generally requiring licenses for the use or operation of any apparatus for the interstate or foreign transmission of energy, communications, or signals by radio)). Since, as we hold, *infra*, the authority of the Commission recognized in *Southwestern* is sufficient to sustain the cablecasting requirement at issue here, we need not, and do not, pass upon the extent of the Commission's jurisdiction over CATV under § 301. See, *e. g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *General Telephone Co. of Cal.* v. *FCC*, 134 U. S. App. D. C. 116, 130–131, 413 F. 2d 390, 404–405 (1969); *Philadelphia Television Broadcasting Co.* v. *FCC*, 123 U. S. App. D. C. 298, 300, 359 F. 2d 282, 284 (1966):

"In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."

[14] Although this holding was specifically limited to "existing cable television operators," the court's reasoning extended more broadly to all CATV systems, and, indeed, its judgment set aside the regulation in all its applications. See 441 F. 2d, at 1328.

Respondent also challenged other regulations, promulgated in the Commission's First Report and Order and Memorandum Opinion and Order, dealing with advertising, "equal time," "fairness," sponsorship identification, and per-program or per-channel charges on cablecasts. The Court of Appeals, however, did not "[pass] on the power of the FCC . . . to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs," *id.*, at 1326, since respondent acknowledged that it did not want to cablecast and hence lacked standing to attack those rules. See *id.*, at 1328.

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bilities in the broadcasting field," *id.*, at 1326—a standard that the court thought the Commission's regulation "goes far beyond." *Id.*, at 1327.[15] The court's opinion may also be understood to hold the regulation invalid as not supported by substantial evidence that it would serve the public interest. "The Commission report itself shows," the court said, "that upon the basis of the record made, it is highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest." *Id.*, at 1328. "Entering into the program origination field involves very substantial expenditures," *id.*, at 1327, and "[a] high probability exists that cablecasting will not be self-supporting," that there will be a "substantial increase" in CATV subscription fees, and that "in some instances" CATV operators will be driven out of business. *Ibid.*[16] We granted certiorari. 404 U. S. 1014 (1972). We reverse.

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[15] The court held, in addition, that the Commission may not require CATV operators "as a condition to [their] right to use . . . captured [broadcast] signals in their existing franchise operation to engage in the entirely new and different business of originating programs." *Id.*, at 1327. This holding presents no separate question from the "reasonably ancillary" issue that need be considered here. See n. 22, *infra*.

[16] Concurring in the result in a similar vein, Judge Gibson concluded that although "the FCC has authority over CATV systems," "the order under review is confiscatory and hence arbitrary," 441 F. 2d, at 1328, for the regulation "would be extremely burdensome and perhaps remove from the CATV field many entrepreneurs who do not have the resources, talent and ability to enter the broadcasting field." *Id.*, at 1329. If this is to suggest that the regulation is invalid merely because it burdens CATV operators or may even force some of them out of business, the argument is plainly incorrect. See n. 31, *infra*. The question would still remain whether the Commission reasonably found on substantial evidence that the regulation on balance would promote policy objectives committed to its jurisdiction under the Communications Act, which, for the reasons given *infra*, we hold that it did.

I

In 1966 the Commission promulgated regulations that, in general, required CATV systems (1) to carry, upon request and in a specified order of priority within the limits of their channel capacity, the signals of broadcast stations into whose service area they brought competing signals; (2) to avoid, upon request, the duplication on the same day of local station programing; and (3) to refrain from bringing new distant signals into the 100 largest television markets except upon a prior showing that that service would be consistent with the public interest. See Second Report and Order, 2 F. C. C. 2d 725 (1966). In assessing the Commission's jurisdiction over CATV against the backdrop of these regulations,[17] we focused in *Southwestern* chiefly on § 2 (a) of the Communications Act, 48 Stat. 1064, as amended, 47 U. S. C. § 152 (a), which provides in pertinent part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio . . . , which originates and/or is received within the United States, and to all persons engaged within the United States in such communication . . . ." In view of the Act's definitions of "communication by wire" and "communication by radio," [18] the interstate character of CATV services,[19]

[17] *Southwestern* reviewed, but did not specifically pass upon the validity of, the regulations. See 392 U. S., at 167. Their validity was, however, subsequently and correctly upheld by courts of appeals as within the guidelines of that decision. See, *e. g., Black Hills Video Corp.* v. *FCC*, 399 F. 2d 65 (CA8 1968).

[18] Sections 3 (a), (b), 48 Stat. 1065, 47 U. S. C. §§ 153 (a), (b), define these terms to mean "the transmission" "of writing, signs, signals, pictures, and sounds of all kinds," whether by cable or radio, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

[19] "Nor can we doubt that CATV systems are engaged in interstate communication, even where . . . the intercepted signals ema-

and the evidence of congressional intent that "[t]he Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,' " 392 U. S., at 167–168 (footnotes omitted), we held that § 2 (a) amply covers CATV systems and operations. We also held that § 2 (a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply:

> "We cannot [we said] construe the Act so restrictively. Nothing in the language of § [2 (a)], in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. . . . Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' *F. C. C.* v. *Pottsville Broadcasting Co.*, [309 U. S.],

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nate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; [CATV operators] thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize [CATV] activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.' *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 279." 392 U. S., at 168–169.

> at 138, that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.' Thus, '[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.' [*Ibid.*] Congress in 1934 acted in a field that was demonstrably 'both new and dynamic,' and it therefore gave the Commission 'a comprehensive mandate,' with 'not niggardly but expansive powers.' *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 219. We have found no reason to believe that § [2] does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.'" *Id.,* at 172–173 (footnotes omitted).

This conclusion, however, did not end the analysis, for § 2 (a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV might properly be exercised. We accordingly went on to evaluate the reasons for which the Commission had asserted jurisdiction and found that "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities." *Id.,* at 173. In particular, we found that the Commission had reasonably determined that "'the unregulated explosive growth of CATV,'" especially through "its importation of distant signals into the service areas of local stations" and the resulting division of audiences and revenues, threatened to "deprive the public of the various benefits of [the] system of local broadcasting stations" that the Commission was charged with developing and overseeing under § 307 (b) of the

Act.[20] *Id.*, at 175. We therefore concluded, without expressing any view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes," that the Commission does have jurisdiction over CATV "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting . . . [and] may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'" *Id.*, at 178 (quoting § 303 (r) of the Act, 50 Stat. 191, 47 U. S. C. § 303 (r)).

The parties now before us do not dispute that in light of *Southwestern* CATV transmissions are subject to the Commission's jurisdiction as "interstate . . . communication by wire or radio" within the meaning of § 2 (a) even insofar as they are local cablecasts.[21] The contro-

[20] See n. 12, *supra*. See also §§ 303 (f), (h), 48 Stat. 1082, 47 U. S. C. §§ 303 (f), (h) (authorizing the Commission to prevent interference among stations and to establish areas to be served by them respectively). "In particular, the Commission feared that CATV might . . . significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters." 392 U. S., at 175–176.

[21] This, however, is contested by the State of Illinois as *amicus curiae*. It is, nevertheless, clear that cablecasts constitute communication by wire (or radio if microwave transmission is involved), as well as interstate communication if the transmission itself has moved interstate, as the Commission has authorized and encouraged. See First Report and Order 207–208 (regional and national interconnections) and n. 6, *supra*. The capacity for interstate nonbroadcast programing may in itself be sufficient to bring cablecasts within the compass of § 2 (a). In *Southwestern* we declined to carve CATV broadcast transmissions, for the purpose of determining the extent of the Commission's regulatory authority, into interstate and intrastate components. See n. 19, *supra*. This result was justified by the extent of interstate broadcast programing, the interdependencies between the two components, and the need to preserve the "'unified and comprehensive regulatory system

versy, instead, centers on whether the Commission's program-origination rule is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." [22] We hold that it is.

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for the [broadcasting] industry.'" 392 U. S., at 168 (quoting *FCC* v. *Pottsville Broadcasting Co.*, n. 13, *supra*, at 137). A similar rationale may apply here, despite the lesser "interstate content" of cablecasts at present.

But we need not now decide that question because, in any event, CATV operators have, by virtue of their carriage of broadcast signals, necessarily subjected themselves to the Commission's comprehensive jurisdiction. As MR. CHIEF JUSTICE (then Judge) BURGER has stated in a related context:

"The Petitioners [telephone companies providing CATV channel distribution facilities] have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." *General Telephone Co. of Cal.* v. *FCC*, n. 13, *supra*, at 127, 413 F. 2d, at 401.

The devotion of CATV systems to broadcast transmission—together with the interdependencies between that service and cablecasts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's § 2 (a) jurisdiction. See generally Barnett, State, Federal, and Local Regulation of Cable Television, 47 Notre Dame Law. 685, 721–723, 726–734 (1972).

[22] Since "[t]he function of CATV systems has little in common with the function of broadcasters," *Fortnightly Corp.* v. *United Artists Television*, 392 U. S. 390, 400 (1968), and since "[t]he fact that . . . property is devoted to a public use on certain terms does not justify . . . the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the [owner] has expressly or impliedly assumed," *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 595 (1915), respondent also argues that CATV operators may not be required to cablecast as a condition for their customary service of carrying broadcast signals. This conclusion might follow only if the program-origination requirement is not reasonably ancillary to the Commission's jurisdiction over broadcasting. For, as we held in *Southwestern*, CATV operators *are*, at least to that

At the outset we must note that the Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV may have on broadcast services. *Southwestern* refers to the Commission's "various responsibilities for the regulation of television broadcasting." These are considerably more numerous than simply assuring that broadcast stations operating in the public interest do not go out of business. Moreover, we must agree with the Commission that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies." *Supra*, at 653. Since the avoidance of adverse effects is itself the furtherance of statutory policies, no sensible distinction even in theory can be drawn along those lines. More important, CATV systems, no less than broadcast stations, see, *e. g., Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933) (deletion of a station), may enhance as well as impair the appropriate

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extent, engaged in a business subject to the Commission's regulation. Our holding on the "reasonably ancillary" issue is therefore dispositive of respondent's additional claim. See *infra*, at 669–670.

It should be added that *Fortnightly Corp.* v. *United Artists Television*, *supra*, has no bearing on the "reasonably ancillary" question. That case merely held that CATV operators who retransmit, but do not themselves originate copyrighted works do not "perform" them within the meaning of the Copyright Act, 61 Stat. 652, as amended, 17 U. S. C. § 1, since "[e]ssentially, [that kind of] a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals . . . ." 392 U. S., at 399. The analogy thus drawn between CATV operations and broadcast viewing for copyright purposes obviously does not dictate the extent of the Commission's authority to regulate CATV under the Communications Act. Indeed, *Southwestern*, handed down only a week before *Fortnightly*, expressly held that CATV systems are not merely receivers, but transmitters of interstate communication subject to the Commission's jurisdiction under that Act. See 392 U. S., at 168.

provision of broadcast services. Consequently, to define the Commission's power in terms of the protection, as opposed to the advancement, of broadcasting objectives would artificially constrict the Commission in the achievement of its statutory purposes and be inconsistent with our recognition in *Southwestern* "that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' . . . that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.'" *Supra*, at 660–661.[23]

The very regulations that formed the backdrop for our decision in *Southwestern* demonstrate this point. Those regulations were, of course, avowedly designed to guard broadcast services from being undermined by unregulated CATV growth. At the same time, the Commission recognized that "CATV systems . . . have arisen in response to public need and demand for improved television service and perform valuable public services in this respect." Second Report and Order, 2 F. C. C. 2d 725, 745 (1966).[24] Accordingly, the Commission's express purpose was not

> "to deprive the public of these important benefits or to restrict the enriched programing selection which

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[23] See also *General Telephone Co. of Cal.* v. *FCC*, n. 13, *supra*, at 124, 413 F. 2d, at 398:

"Over the years, the Commission has been required to meet new problems concerning CATV and as cases have reached the courts the scope of the Act has been defined, as Congress contemplated would be done, so as to avoid a continuing process of statutory revision. To do otherwise in regulating a dynamic public service function such as broadcasting would place an intolerable regulatory burden on the Congress—one which it sought to escape by delegating administrative functions to the Commission."

[24] The Commission elaborated:

"CATV . . . has made a significant contribution to meeting the public demand for television service in areas too small in popula-

> CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303 (g) of the act [nn. 9 and 11, *supra*]), both those who are cable viewers and those dependent on off-the-air service. The new rules . . . are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service." *Id.*, at 745–746.[25]

In implementation of this approach CATV systems were required to carry local broadcast station signals to encourage diversified programing suitable to the community's needs as well as to prevent a diversion of audiences and advertising revenues.[26] The duplication of

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tion to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services. In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest 'in the larger and more effective use of radio.' And, even in the major market, where there may be no dearth of service . . . , CATV may . . . increase viewing opportunities, either by bringing in programing not otherwise available or, what is more likely, bringing in programing locally available but at times different from those presented by the local stations." Second Report and Order, 2 F. C. C. 2d 725, 781 (1966). See also *id.*, at 745.

[25] This statement, made with reference only to the local carriage and non-duplication requirements, was no less true of the distant importation rule. See *id.*, at 781–782.

[26] The regulation, for example, retained the provision of the Commission's earlier rule governing CATV microwave systems under which a local signal was not required to be carried "if (1) it substantially duplicates the network programing of a signal of a higher grade, and (2) carrying it would—because of limited channel capac-

local station programing was also forbidden for the latter purpose, but only on the same day as the local broadcast so as "to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programing and a wider selection of programs on any particular day." *Id.*, at 747. Finally, the distant-importation rule was adopted to enable the Commission to reach a public-interest determination weighing the advantages and disadvantages of the proposed service on the facts of each individual case. See *id.*, at 776, 781–782. In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting.

In this light the critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-estab-

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ity—prevent the system from carrying a nonnetwork signal, which would contribute to the diversity of its service." First Report and Order, 38 F. C. C. 683, 717 (1965). See Second Report and Order, n. 24, *supra*, at 752–753. Moreover, CATV operators were warned that, in reviewing their discretionary choice of stations to carry among those of equal priority in certain circumstances, the Commission would "give particular consideration to any allegation that the station not carried is one with closer community ties." *Id.*, at 755. In addition, operators were required to carry the signals of local satellite stations even if they also carried the signals of the satellites' parents; otherwise, "the satellite [might] lose audience for which it may be originating some local programing and [find] its incentive to originate programs [reduced]." *Id.*, at 755–756. Finally, the Commission indicated that, in considering waivers of the regulation, it would "[accord] substantial weight" to such considerations as whether "the programing of stations located within the State would be of greater interest than those of nearer, but out-of-State stations [otherwise required to be given priority in carriage]—e. g., coverage of political elections and other public affairs of statewide concern." *Id.*, at 753.

lished regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ." *Supra*, at 654. We find that it has.

The goals specified are plainly within the Commission's mandate for the regulation of television broadcasting.[27] In *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), for example, we sustained Commission regulations governing relations between broadcast stations and network organizations for the purpose of preserving the stations' ability to serve the public interest through their programing. Noting that "[t]he facilities of radio are not large enough to accommodate all who wish to use them," *id.*, at 216, we held that the Communications "Act does not restrict the Commission merely to supervision of [radio] traffic. It puts upon the Commission the burden of determining the composition of that traffic." *Id.*, at 215–216. We then upheld the Commission's judgment that

> " '[w]ith the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them.' " *Id.*, at 218.
>
> " 'A station licensee must retain sufficient freedom of action to supply the program . . . needs of the local community. Local program service is a vital part of community life. A station should be ready,

[27] As the Commission stated, "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' *Associated Press* v. *United States*, 326 U. S. 1, 20; *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 395 U. S. 367 . . . ." First Report and Order 205.

> able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.'" *Id.*, at 203.

Equally plainly the broadcasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programing—the same objective underlying regulations sustained in *National Broadcasting Co.* v. *United States, supra,* as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld. See *supra,* at 666 and nn. 17 and 26, *supra.* In essence the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage. In the one case, of course, the concern is with the strength of the picture and voice received by the subscriber, while in the other it is with the content of the programing offered. But in both cases the rules serve the policies of §§ 1 and 303 (g) of the Communications Act on which the cablecasting regulation is specifically premised, see *supra,* at 654–656,[28] and also, in the Commission's words,

[28] Respondent apparently does not dispute this, but contends instead that §§ 1 and 303 (g) merely state objectives without granting power for their implementation. See Brief for Midwest Video Corp. 24. The cablecasting requirement, however, is founded on those provisions for the policies they state and not for any regulatory power they might confer. The regulatory power itself may be found, as in *Southwestern,* see *supra,* at 660, 662, in 47 U. S. C. §§ 152 (a), 303 (r).

"facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities" under § 307 (b). *Supra*, at 656.[29] In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

Respondent, nevertheless, maintains that just as the Commission is powerless to require the provision of television broadcast services where there are no applicants for station licenses no matter how important or desirable those services may be, so, too, it cannot require CATV operators unwillingly to engage in cablecasting. In our view, the analogy respondent thus draws between entry into broadcasting and entry into cablecasting is misconceived. The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

For these reasons we conclude that the program-origination rule is within the Commission's authority recognized in *Southwestern*.

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[29] Respondent asserts that "it is difficult to see how a mandatory [origination] requirement . . . can be said to aid the Commission in preserving the availability of broadcast stations to the several states and communities." Brief for Midwest Video Corp. 24. Respondent ignores that the provision of additional programing outlets by CATV necessarily affects the fairness, efficiency, and equity of the distribution of television services. We have no basis, it may be added, for overturning the Commission's judgment that the effect in this regard will be favorable. See *supra*, at 654–655 and n. 10.

II

The question remains whether the regulation is supported by substantial evidence that it will promote the public interest. We read the opinion of the Court of Appeals as holding that substantial evidence to that effect is lacking because the regulation creates the risk that the added burden of cablecasting will result in increased subscription rates and even the termination of CATV services. That holding is patently incorrect in light of the record.

In first proposing the cablecasting requirement, the Commission noted that "[t]here may . . . be practical limitations [for compliance] stemming from the size of some CATV systems" and accordingly sought comments "as to a reasonable cutoff point [for application of the regulation] in light of the cost of the equipment and personnel minimally necessary for local originations." Notice of Proposed Rulemaking and Notice of Inquiry, 15 F. C. C. 2d 417, 422 (1968). The comments filed in response to this request included detailed data indicating, for example, that a basic monochrome system for cablecasting could be obtained and operated for less than an annual cost of $21,000 and a color system, for less than $56,000. See First Report and Order 210. This information, however, provided only a sampling of the experience of the CATV systems already engaged in program origination. Consequently, the Commission

> "decided not to prescribe a permanent minimum cutoff point for required origination on the basis of the record now before us. The Commission intends to obtain more information from originating systems about their experience, equipment, and the nature of the origination effort. . . . In the meantime, we

> will prescribe a very liberal standard for required origination, with a view toward lowering this floor in . . . further proceedings, should the data obtained in such proceedings establish the appropriateness and desirability of such action." *Id.*, at 213.

On this basis the Commission chose to apply the regulation to systems with 3,500 or more subscribers, effective January 1, 1971.

> "This standard [the Commission explained] appears more than reasonable in light of the [data filed], our decision to permit advertising at natural breaks . . . , and the 1-year grace period. Moreover, it appears that approximately 70 percent of the systems now originating have fewer than 3,500 subscribers; indeed, about half of the systems now originating have fewer than 2,000 subscribers. . . . [T]he 3,500 standard will encompass only a very small percentage of existing systems at present subscriber levels, less than 10 percent." *Ibid.*

On petitions for reconsideration the Commission observed that it had "been given no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability, raising rates or reducing the quality of service." Memorandum Opinion and Order 826. The Commission repeated that "[t]he rule adopted is minimal in the light of the potentials of cablecasting," [30] but, nonetheless, on its own motion postponed the effective date of the regulation to April 1, 1971, "to afford additional preparation time." *Id.*, at 827.

This was still not the Commission's final effort to tailor the regulation to the financial capacity of CATV oper-

[30] Commissioner Bartley, however, dissented on the ground that the regulation should apply only to systems with over 7,500 subscribers. Memorandum Opinion and Order 831.

ators. In denying respondent's motion for a stay of the effective date of the rule, the Commission reiterated that "there has been no showing made to support the view that compliance . . . would be an unsustainable burden." Memorandum Opinion and Order, 27 F. C. C. 2d 778, 779 (1971). On the other hand, the Commission recognized that new information suggested that CATV systems of 10,000 ultimate subscribers would operate at a loss for at least four years if required to cablecast. That information, however, was based on capital expenditure and annual operating cost figures "appreciably higher" than those first projected by the Commission. *Ibid.* The Commission concluded:

> "While we do not consider that an adequate showing has been made to justify general change, we see no public benefit in risking injury to CATV systems in providing local origination. Accordingly, if CATV operators with fewer than 10,000 subscribers request *ad hoc* waiver of [the regulation], they will not be required to originate pending action on their waiver requests. . . . Systems of more than 10,000 subscribers may also request waivers, but they will not be excused from compliance unless the Commission grants a requested waiver . . . . [The] benefit [of cablecasting] to the public would be delayed if the . . . stay [requested by respondent] is granted, and the stay would, therefore, do injury to the public's interest." *Ibid.*

This history speaks for itself. The cablecasting requirement thus applied is plainly supported by substantial evidence that it will promote the public interest.[31] Indeed, respondent does not appear to argue

[31] Nor is the regulation infirm for its failure to grant "grandfather" rights, see n. 7, *supra*, as the Commission warned would be the case in its Notice of Proposed Rulemaking and Notice of

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to the contrary. See Tr. of Oral Arg. 43–44. It was, of course, beyond the competence of the Court of Appeals itself to assess the relative risks and benefits of cablecasting. As we said in *National Broadcasting Co.* v. *United States*, 319 U. S., at 224:

> "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to

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Inquiry, 15 F. C. C. 2d 417, 424 (1968). See, *e. g.*, *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 282 (1933) ("the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy"). Judge Tuttle has elaborated, *General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 863–864 (CA5 1971):

"In a complex and dynamic industry such as the communications field, it cannot be expected that the agency charged with its regulation will have perfect clairvoyance. Indeed as Justice Cardozo once said, 'Hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision.' Cardozo, The Nature of the Judicial Process 145 (1921). The Commission, thus, must be afforded some leeway in developing policies and rules to fit the exigencies of the burgeoning CATV industry. Where the on-rushing course of events [has] outpaced the regulatory process, the Commission should be enabled to remedy the [problem] . . . by retroactive adjustments, provided they are reasonable. . . .

"Admittedly the rule here at issue has an effect on activities embarked upon prior to the issuance of the Commission's Final Order and Report. Nonetheless the announcement of a new policy will inevitably have retroactive consequences. . . . The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."

With regard to federal infringement of franchise rights, see generally Barnett, n. 21, *supra*, at 703–705 and n. 116.

> say that the 'public interest' will [in fact] be furthered or retarded by the . . . [regulation]."

See also, *e. g., United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 203 (1956); *General Telephone Co. of Southwest* v. *United States*, 449 F. 2d 846, 858–859, 862–863 (CA5 1971).

Reversed.

MR. CHIEF JUSTICE BURGER, concurring in the result.

This case presents questions of extraordinary difficulty and sensitivity in the communications field, as the opinions of the divided Court of Appeals and our own divisions reflect. As MR. JUSTICE BRENNAN has noted, Congress could not anticipate the advent of CATV when it enacted the regulatory scheme nearly 40 years ago. Yet that statutory scheme plainly anticipated the need for comprehensive regulation as pervasive as the reach of the instrumentalities of broadcasting.

In the four decades spanning the life of the Communications Act, the courts have consistently construed the Act as granting pervasive jurisdiction to the Commission to meet the expansion and development of broadcasting. That approach was broad enough to embrace the advent of CATV, as indicated in the plurality opinion. CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.

Concededly, the Communications Act did not explicitly contemplate either CATV or the jurisdiction the Commission has now asserted. However, Congress was well aware in the 1930's that broadcasting was a dynamic instrumentality, that its future could not be predicted, that scientific developments would inevitably enlarge the role and scope of broadcasting, and that, in consequence,

regulatory schemes must be flexible and virtually open-ended.

Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.

I agree with the plurality's rejection of any meaningful analogy between requiring CATV operators to develop programing and the concept of commandeering someone to engage in broadcasting. Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.

I am not fully persuaded that the Commission has made the correct decision in this case and the thoughtful opinions in the Court of Appeals and the dissenting opinion here reflect some of my reservations. But the scope of our review is limited and does not permit me to resolve this issue as perhaps I would were I a member of the Federal Communications Commission. That I might take a different position as a member of the Commission gives me no license to do so here. Congress has created its instrumentality to regulate broadcasting, has given it pervasive powers, and the Commission has generations of experience and "feel" for the problem. I therefore conclude that until Congress acts, the Commission should be allowed wide latitude and I therefore concur in the result reached by this Court.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concur, dissenting.

The policies reflected in the plurality opinion may be wise ones. But whether CATV systems should be required to originate programs is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted.

CATV captures TV and radio signals, converts the signals, and carries them by microwave relay transmission or by coaxial cables into communities unable to receive the signals directly. In *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, we upheld the power of the Commission to regulate the transmission of signals. As we said in that case:

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals." *Id.*, at 163.

CATV evolved after the Communications Act of 1934, 48 Stat. 1064, was passed. But we held that the reach of the Act, which extends "to all interstate and foreign communication by wire or radio," 47 U. S. C. § 152 (a), was not limited to the precise methods of communication then known. 392 U. S., at 173.

Compulsory origination of programs is, however, a far cry from the regulation of communications approved in

Southwestern Cable. Origination requires new investment and new and different equipment, and an entirely different cast of personnel.[1] See 20 F. C. C. 2d 201, 210–211. We marked the difference between communication and origination in *Fortnightly Corp.* v. *United Artists Television,* 392 U. S. 390, and made clear how foreign the origination of programs is to CATV's traditional transmission of signals. In that case, CATV was sought to be held liable for infringement of copyrights of movies licensed to broadcasters and carried by CATV. We held CATV not liable, saying:

> "Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

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[1] In light of the striking difference between origination and communication, the suggestion that "the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage," *ante,* at 669, appears misconceived.

> "The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." *Id.*, at 399–401.

The Act forbids any person from operating a broadcast station without first obtaining a license from the Commission. 47 U. S. C. § 301. Only qualified persons may obtain licenses and they must operate in the public interest. 47 U. S. C. §§ 308–309. But nowhere in the Act is there the slightest suggestion that a person may be compelled to enter the broadcasting or cablecasting field. Rather, the Act extends "to all interstate and foreign communication by wire or radio . . . which *originates and/or is received* within the United States." 47 U. S. C. § 152 (a) (emphasis added). When the Commission jurisdiction is so limited, it strains logic to hold that this jurisdiction may be expanded by requiring someone to "originate" or "receive."

The Act, when dealing with broadcasters, speaks of "applicants," "applications for licenses," see 47 U. S. C. §§ 307–308, and "whether the public interest, convenience, and necessity will be served by the granting of such application." 47 U. S. C. § 309 (a). The emphasis in the Committee Reports was on "original applications" and "application for the renewal of a license." H. R. Rep. No. 1918, 73d Cong., 2d Sess., 48; S. Rep. No. 781, 73d Cong., 2d Sess., 7, 9. The idea that a carrier

or any other person can be drafted against his will to become a broadcaster is completely foreign to the history of the Act, as I read it.

CATV is simply a carrier having no more control over the message content than does a telephone company. A carrier may, of course, seek a broadcaster's license; but there is not the slightest suggestion in the Act or in its history that a carrier can be bludgeoned into becoming a broadcaster while all other broadcasters live under more lenient rules. There is not the slightest clue in the Act that CATV carriers can be compulsorily converted into broadcasters.

The plurality opinion performs the legerdemain by saying that the requirement of CATV origination is "reasonably ancillary" to the Commission's power to regulate television broadcasting.[2] That requires a brand-new amendment to the broadcasting provisions of the Act, which only the Congress can effect. The Commission is not given *carte blanche* to initiate broadcasting stations; it cannot force people into the business. It cannot say to one who applies for a broadcast outlet in city A that the need is greater in city B and he will be licensed there. The fact that the Commission has authority to regulate origination of programs if CATV decides to enter the field does not mean that it can compel CATV to originate programs. The fact that the Act directs the Commission to encourage the larger and more effective use of radio in the public interest, 47

[2] The separate opinion of THE CHIEF JUSTICE reaches the same result by saying "CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act." *Ante*, at 675. The difficulty is that this analysis knows no limits short of complete domination of the field of communications by the Commission. This reasoning—divorced as it is from any specific statutory basis—could as well apply to the manufacturers of radio and television broadcasting and receiving equipment.

U. S. C. § 303 (g), relates to the objectives of the Act and does not grant power to compel people to become broadcasters any more than it grants the power to compel broadcasters to become CATV operators.

The upshot of today's decision is to make the Commission's authority over activities "ancillary" to its responsibilities greater than its authority over any broadcast licensee. Of course, the Commission can regulate a CATV that transmits broadcast signals. But to entrust the Commission with the power to force some, a few, or all CATV operators into the broadcast business is to give it a forbidding authority. Congress may decide to do so. But the step is a legislative measure so extreme that we should not find it interstitially authorized in the vague language of the Act.

I would affirm the Court of Appeals.

KIRBY *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 70–5061. Argued November 11, 1971—Reargued March 20–21, 1972—Decided June 7, 1972

Petitioner and a companion were stopped for interrogation. When each produced, in the course of demonstrating identification, items bearing the name "Shard," they were arrested and taken to the police station. There, the arresting officers learned of a robbery of one "Shard" two days before. The officers sent for Shard, who immediately identified petitioner and his companion as the robbers. At the time of the confrontation petitioner and his companion were not advised of the right to counsel, nor did either ask for or receive legal assistance. Six weeks later, petitioner and his companion were indicted for the Shard robbery. At the trial, after a pretrial motion to suppress his testimony had been overruled, Shard testified as to his previous identification of petitioner and his companion, and again identified them as the robbers. The defendants were found guilty and petitioner's conviction was upheld on appeal, the appellate court holding that the *per se* exclusionary rule of *United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263, did not apply to pre-indictment confrontations. *Held:* The judgment is affirmed. Pp. 687–691.

121 Ill. App. 2d 323, 257 N. E. 2d 589, affirmed.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST, concluded that a showup after arrest, but before the initiation of any adversary criminal proceeding (whether by way of formal charge, preliminary hearing, indictment, information, or arraignment), unlike the post-indictment confrontations involved in *Gilbert* and *Wade*, is not a criminal prosecution at which the accused, as a matter of absolute right, is entitled to counsel. Pp. 687–691.

MR. JUSTICE POWELL concurred in the result. P. 691.

STEWART, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring statement, *post*, p. 691. POWELL, J., filed a statement concurring in the result, *post*, p. 691. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and

MARSHALL, JJ., joined, *post,* p. 691. WHITE, J., filed a dissenting statement, *post,* p. 705.

Jerold S. Solovy argued the cause for petitioner on the reargument and *Michael P. Seng* argued the cause on the original argument. *Messrs. Solovy* and *Seng* were on the briefs for petitioner.

James B. Zagel, Assistant Attorney General of Illinois, reargued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *E. James Gildea,* Assistant Attorney General.

Ronald M. George, Deputy Attorney General, argued the cause on the reargument for the State of California as *amicus curiae* urging affirmance. With him on the brief were *Evelle J. Younger,* Attorney General, and *William E. James,* Assistant Attorney General.

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join.

In *United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263, this Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." *Gilbert* v. *California, supra,* at 272. Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a *per se* exclusionary rule as to such testimony can be an effective sanction," the Court said, "to assure that law

enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273. In the present case we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place *before* the defendant had been indicted or otherwise formally charged with any criminal offense.

On February 21, 1968, a man named Willie Shard reported to the Chicago police that the previous day two men had robbed him on a Chicago street of a wallet containing, among other things, traveler's checks and a Social Security card. On February 22, two police officers stopped the petitioner and a companion, Ralph Bean, on West Madison Street in Chicago.[1] When asked for identification, the petitioner produced a wallet that contained three traveler's checks and a Social Security card, all bearing the name of Willie Shard. Papers with Shard's name on them were also found in Bean's possession. When asked to explain his possession of Shard's property, the petitioner first said that the traveler's checks were "play money," and then told the officers that he had won them in a crap game. The officers then arrested the petitioner and Bean and took them to a police station.

Only after arriving at the police station, and checking the records there, did the arresting officers learn of the Shard robbery. A police car was then dispatched to Shard's place of employment, where it picked up Shard and brought him to the police station. Immediately upon entering the room in the police station where the petitioner and Bean were seated at a table, Shard positively identified them as the men who had

[1] The officers stopped the petitioner and his companion because they thought the petitioner was a man named Hampton, who was "wanted" in connection with an unrelated criminal offense. The legitimacy of this stop and the subsequent arrest is not before us.

robbed him two days earlier. No lawyer was present in the room, and neither the petitioner nor Bean had asked for legal assistance, or been advised of any right to the presence of counsel.

More than six weeks later, the petitioner and Bean were indicted for the robbery of Willie Shard. Upon arraignment, counsel was appointed to represent them, and they pleaded not guilty. A pretrial motion to suppress Shard's identification testimony was denied, and at the trial Shard testified as a witness for the prosecution. In his testimony he described his identification of the two men at the police station on February 22,[2] and identified them again in the courtroom as the men

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[2] "Q. All right. Now, Willie, calling your attention to February 22, 1968, did you receive a call from the police asking you to come down to the station?

"A. Yes, I did.

. . . . . .

"Q. When you went down there, what if anything, happened, Willie?

"A. Well, I seen the two men was down there who robbed me.

. . . . . .

"Q. Who took you to the police station?

"A. The policeman picked me up.

. . . . . .

"MR. POMARO: Q. When you went to the police station did you see the two defendants?

"A. Yes, I did.

"Q. Do you see them in Court today?

"A. Yes, sir.

"Q. Point them out, please?

"A. Yes, that one there and the other one. (Indicating.)

"MR. POMARO: Indicating for the record the defendants Bean and Kirby.

"Q. And you positively identified them at the police station, is that correct?

"A. Yes.

"Q. Did any police officer make any suggestion to you whatsoever?

. . . . . .

"THE WITNESS: No, they didn't."

who had robbed him on February 20.[3] He was cross-examined at length regarding the circumstances of his identification of the two defendants. Cf. *Pointer* v. *Texas*, 380 U. S. 400. The jury found both defendants guilty, and the petitioner's conviction was affirmed on appeal. *People* v. *Kirby*, 121 Ill. App. 2d 323, 257 N. E. 2d 589.[4] The Illinois appellate court held that the admission of Shard's testimony was not error, relying upon an earlier decision of the Illinois Supreme Court, *People* v. *Palmer*, 41 Ill. 2d 571, 244 N. E. 2d 173, holding that the *Wade-Gilbert per se* exclusionary rule is not applicable to pre-indictment confrontations.

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[3] "Q. Willie, when you looked back, when you were walking down the street and first saw the defendants, when you looked back, did you see them then?

"A. Yes, I seen them.

"Q. Did you get a good look at them then?

"A. Yes, I did.

"Q. All right. Now, when they grabbed you and took your money, did you see them then?

"A. Yes, I did.

"Q. Did you get a good look at them then?

"A. Yes.

"Q. Both of them?

"A. Correct.

"Q. When they walked away did you see them then?

"A. Yes.

"Q. Did you look at them, Willie?

"A. Yes.

"Q. Did you get a good look at them?

"A. Yes.

"Q. Are those the same two fellows? Look at them, Willie.

"A. Correct.

"Q. Are those the same two that robbed you?

"A. Yes.

"Q. You are sure, Willie?

"A. Yes."

[4] Bean's conviction was reversed. *People* v. *Bean*, 121 Ill. App. 2d 332, 257 N. E. 2d 562.

We granted certiorari, limited to this question. 402 U. S. 995.[5]

I

We note at the outset that the constitutional privilege against compulsory self-incrimination is in no way implicated here. The Court emphatically rejected the claimed applicability of that constitutional guarantee in *Wade* itself:

> "Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege 'protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . .' *Schmerber* v. *California*, 384 U. S. 757, 761. . . ." 388 U. S., at 221.
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> . . . . .
>
> "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused

[5] The issue of the applicability of *Wade* and *Gilbert* to pre-indictment confrontation has severely divided the courts. Compare *State* v. *Fields*, 104 Ariz. 486, 455 P. 2d 964; *Perkins* v. *State*, 228 So. 2d 382 (Fla.); *Buchanan* v. *Commonwealth*, 210 Va. 664, 173 S. E. 2d 792; *State* v. *Walters*, 457 S. W. 2d 817 (Mo.), with *United States* v. *Greene*, 139 U. S. App. D. C. 9, 429 F. 2d 193; *Rivers* v. *United States*, 400 F. 2d 935 (CA5); *United States* v. *Phillips*, 427 F. 2d 1035 (CA9); *Commonwealth* v. *Guillory*, 356 Mass. 591, 254 N. E. 2d 427; *People* v. *Fowler*, 1 Cal. 3d 335, 461 P. 2d 643; *Palmer* v. *State*, 5 Md. App. 691, 249 A. 2d 482; *People* v. *Hutton*, 21 Mich. App. 312, 175 N. W. 2d 860; *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A. 2d 738; *In re Holley*, 107 R. I. 615, 268 A. 2d 723; *Hayes* v. *State*, 46 Wis. 2d 93, 175 N. W. 2d 625.

to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. . . ." *Id.*, at 222.

It follows that the doctrine of *Miranda* v. *Arizona*, 384 U. S. 436, has no applicability whatever to the issue before us; for the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive.

The *Wade-Gilbert* exclusionary rule, by contrast, stems from a quite different constitutional guarantee—the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments. Unless all semblance of principled constitutional adjudication is to be abandoned, therefore, it is to the decisions construing that guarantee that we must look in determining the present controversy.

In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama*, 287 U. S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama*, *supra*; *Johnson* v. *Zerbst*, 304 U. S. 458; *Hamilton* v. *Alabama*, 368 U. S. 52; *Gideon* v. *Wainwright*, 372 U. S. 335; *White* v. *Maryland*, 373 U. S. 59; *Massiah* v. *United States*, 377 U. S. 201; *United States* v. *Wade*, 388 U. S. 218; *Gilbert* v. *California*, 388 U. S. 263; *Coleman* v. *Alabama*, 399 U. S. 1.

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The *Powell* case makes clear that the right attaches at the time of arraignment,[6] and the Court

[6] "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their ar-

has recently held that it exists also at the time of a preliminary hearing. *Coleman* v. *Alabama, supra.* But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

The only seeming deviation from this long line of constitutional decisions was *Escobedo* v. *Illinois,* 378 U. S. 478. But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the "prime purpose" of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda,* "to guarantee full effectuation of the privilege against self-incrimination . . . ." *Johnson* v. *New Jersey,* 384 U. S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, *Johnson* v. *New Jersey, supra,* at 733–734, and those facts are not remotely akin to the facts of the case before us.

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

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raignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Powell* v. *Alabama,* 287 U. S. 45, 57.

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It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.[7] See *Powell* v. *Alabama*, 287 U. S., at 66–71; *Massiah* v. *United States*, 377 U. S. 201; *Spano* v. *New York*, 360 U. S. 315, 324 (DOUGLAS, J., concurring).

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. Less than a year after *Wade* and *Gilbert* were decided, the Court explained the rule of those decisions as follows: "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the *prosecution*,' and that a post-indictment lineup is such a 'critical stage.'" (Emphasis supplied.) *Simmons* v. *United States*, 390 U. S. 377, 382–383. We decline to depart from that rationale today by imposing a *per se* exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.

II

What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. As the Court pointed out in *Wade* itself, it is always necessary to "scrutinize *any* pretrial con-

[7] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const., Amdt. VI.

frontation . . . ." 388 U. S., at 227. The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall* v. *Denno,* 388 U. S. 293; *Foster* v. *California,* 394 U. S. 440.[8] When a person has not been formally charged with a criminal offense, *Stovall* strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.

The judgment is affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I agree that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a "criminal prosecution." Therefore, I join in the plurality opinion and in the judgment. Cf. *Coleman* v. *Alabama,* 399 U. S. 1, 21 (dissenting opinion).

MR. JUSTICE POWELL, concurring in the result.

As I would not extend the *Wade-Gilbert per se* exclusionary rule, I concur in the result reached by the Court.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

After petitioner and Ralph Bean were arrested, police officers brought Willie Shard, the robbery victim, to a room in a police station where petitioner and Bean were seated at a table with two other police officers. Shard testified at trial that the officers who brought him to the

[8] In view of our limited grant of certiorari, we do not consider whether there might have been a deprivation of due process in the particularized circumstances of this case. That question remains open for inquiry in a federal habeas corpus proceeding.

room asked him if petitioner and Bean were the robbers and that he indicated they were. The prosecutor asked him, "And you positively identified them at the police station, is that correct?" Shard answered, "Yes." Consequently, the question in this case is whether, under *Gilbert* v. *California*, 388 U. S. 263 (1967), it was constitutional error to admit Shard's testimony that he identified petitioner at the pretrial station-house showup when that showup was conducted by the police without advising petitioner that he might have counsel present. *Gilbert* held, in the context of a post-indictment lineup, that "[o]nly a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.*, at 273. I would apply *Gilbert* and the principles of its companion case, *United States* v. *Wade*, 388 U. S. 218 (1967), and reverse.[1]

In *Wade*, after concluding that the lineup conducted in that case did not violate the accused's right against self-incrimination, *id.*, at 221–223,[2] the Court addressed

[1] There is no room here for the application of the harmless-error doctrine. Because the admission of Shard's testimony about his showup identification thus requires reversal, there is no need for me to consider whether a remand would otherwise be necessary to afford the State an opportunity to demonstrate that Shard's in-court identification of petitioner, if that is what it was, see *ante*, at 686 n. 3, had an independent source. See *United States* v. *Wade*, 388 U. S. 218, 239–242 (1967); *Gilbert* v. *California*, 388 U. S. 263, 272 (1967).

[2] The plurality asserts that in view of that holding in *Wade*, "the doctrine of *Miranda* v. *Arizona*, 384 U. S. 436, has no applicability whatever to the issue before us." *Ante*, at 688. That assertion is necessary for the plurality because *Miranda* requires the presence of counsel before "the time that adversary judicial proceedings have been initiated against" the accused. *Ibid.* The assertion is nonetheless erroneous, for *Wade* specifically relied upon *Miranda* in establishing the constitutional principle that controls the applicability of the Sixth Amendment guarantee of the right to counsel at pretrial confrontations. See 388 U. S., at 226–227.

the argument "that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined," *id.*, at 223–224. The Court began by emphasizing that the Sixth Amendment guarantee "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" *Id.*, at 225. After reviewing *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); and *Massiah* v. *United States*, 377 U. S. 201 (1964), the Court, 388 U. S., at 225, focused upon two cases that involved the right against self-incrimination:

> "In *Escobedo* v. *Illinois*, 378 U. S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence if the accused was to have a fair opportunity to present a defense at the trial itself . . . ." *United States* v. *Wade*, 388 U. S., at 225–226.[3]
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> . . . . .

[3] The plurality asserts that "*Escobedo* is not apposite here." *Ante*, at 689. It was, of course, "apposite" in *Wade*. Hence, to say that *Johnson* v. *New Jersey*, 384 U. S. 719, 733–734 (1966), a case decided before *Wade*, "limited the holding of *Escobedo* to its own facts," *ante*, at 689, even if true, is to say nothing at all that is relevant to the present case. The plurality also utilizes *Johnson* for the proposition "that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . . .'" *Ibid.* In view of *Wade*'s specific reliance upon *Escobedo* and *Miranda*, that, obviously, is no distinction either. Moreover, it implies that the purpose of *Wade* was "to vindicate the constitutional right to counsel as such." That was not the purpose of *Wade*, as my extended summary of the opinion demonstrates.

> "[I]n *Miranda* v. *Arizona*, 384 U. S. 436, the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation." *Id.*, at 226.

The Court then pointed out that "nothing decided or said in the opinions in [*Escobedo* and *Miranda*] links the right to counsel only to protection of Fifth Amendment rights." *Ibid.* To the contrary, the Court said, those decisions simply reflected the constitutional

> "principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . ." *Id.*, at 226–227.

This analysis led to the Court's formulation of the controlling principle for pretrial confrontations:

> "In sum, the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id.*, at 227 (emphasis in original).

It was that constitutional principle that the Court applied in *Wade* to pretrial confrontations for identification purposes. The Court first met the Government's contention that a confrontation for identification is "a mere preparatory step in the gathering of the prosecution's evidence," much like the scientific examination of fingerprints and blood samples. The Court responded that in the latter instances "the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." The accused thus has no right to have counsel present at such examinations: "they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." *Id.*, at 227–228.

In contrast, the Court said, "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*, at 228. Most importantly, "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 231–232. The Court's analysis of pretrial confrontations for identification purposes produced the following conclusion:

> "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-ex-

> amination which is an essential safeguard to his right to confront the witnesses against him. *Pointer* v. *Texas,* 380 U. S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" *Id.,* at 235–236.

The Court then applied that conclusion to the specific facts of the case. "Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.,* at 236–237.

While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that *Wade* did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words "criminal prosecutions" in the Sixth Amendment. Counsel is required at those confrontations because "the

dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification," *id.*, at 235,[4] mean that protection must be afforded to the "most basic right [of] a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined," *id.*, at 224. Indeed, the Court expressly stated that "[l]egislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.' " *Id.*, at 239; see *id.*, at 239 n. 30; *Gilbert* v. *California*, 388 U. S., at 273. Hence, "the initiation of adversary judicial criminal proceedings," *ante*, at 689, is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial.

In view of *Wade*, it is plain, and the plurality today does not attempt to dispute it, that there inhere in a con-

[4] The plurality refers to "occasions during the course of a criminal investigation when the police do abuse identification procedures" and asserts that "[s]uch abuses are not beyond the reach of the Constitution." *Ante*, at 690. The constitutional principles established in *Wade*, however, are not addressed solely to police "abuses," as *Wade* explicitly pointed out:

"The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification." 388 U. S., at 234–235.

frontation for identification conducted after arrest [5] the identical hazards to a fair trial that inhere in such a confrontation conducted "after the onset of formal prosecutorial proceedings." *Id.*, at 690. The plurality apparently considers an arrest, which for present purposes we must assume to be based upon probable cause, to be nothing more than part of "a routine police investigation," *ibid.*, and thus not "the starting point of our whole system of adversary criminal justice," *id.*, at 689.[6] An arrest, according to the plurality, does not face the accused "with the prosecutorial forces of organized society," nor immerse him "in the intricacies of substantive and procedural criminal law." Those consequences ensue, says the plurality, only with "[t]he initiation of judicial criminal proceedings," "[f]or it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Ibid.*[7] If these propositions do not amount to

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[5] This case does not require me to consider confrontations that take place before custody, see, *e. g.*, *Bratten* v. *Delaware*, 307 F. Supp. 643 (Del. 1969); *People* v. *Cesarz*, 44 Ill. 2d 180, 255 N. E. 2d 1 (1969); *State* v. *Moore*, 111 N. J. Super. 528, 269 A. 2d 534 (1970), nor accidental confrontations not arranged by the police, see, *e. g.*, *United States* v. *Pollack*, 427 F. 2d 1168 (CA5 1970); *State* v. *Bibbs*, 461 S. W. 2d 755 (Mo. 1970), nor on-the-scene encounters shortly after the crime, see, *e. g.*, *Russell* v. *United States*, 133 U. S. App. D. C. 77, 408 F. 2d 1280 (1969); *United States* v. *Davis*, 399 F. 2d 948 (CA2 1968).

[6] Cf. *Miranda* v. *Arizona*, 384 U. S. 436, 477 (1966) (emphasis added):

"The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation *while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences,* distinguishing itself at the outset from the inquisitorial system recognized in some countries."

[7] The plurality concludes that "[i]t is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which

"mere formalism," *ibid.*, it is difficult to know how to characterize them.[8] An arrest evidences the belief of the police that the perpetrator of a crime has been caught. A post-arrest confrontation for identification is not "a mere preparatory step in the gathering of the prosecution's evidence." *Wade, supra,* at 227. A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand. The plurality offers no reason, and I can think of none, for concluding that a post-arrest confrontation for identification, unlike a post-charge confrontation, is not among those "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.*, at 224.

The highly suggestive form of confrontation employed in this case underscores the point. This showup was particularly fraught with the peril of mistaken

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alone the explicit guarantees of the Sixth Amendment are applicable." *Ante*, at 690. This Court has taken the contrary position with respect to the speedy-trial guarantee of the Sixth Amendment: "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest." "In the case before us, neither appellee was arrested, charged, or otherwise subjected to formal restraint prior to indictment. It was this event, therefore, which transformed the appellees into 'accused' defendants who are subject to the speedy trial protections of the Sixth Amendment." *United States* v. *Marion,* 404 U. S. 307, 321, 325 (1971).

[8] As the California Supreme Court pointed out, with an eye toward the real world, "the establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information." *People* v. *Fowler,* 1 Cal. 3d 335, 344, 461 P. 2d 643, 650 (1969).

identification. In the setting of a police station squad room where all present except petitioner and Bean were police officers, the danger was quite real that Shard's understandable resentment might lead him too readily to agree with the police that the pair under arrest, and the only persons exhibited to him, were indeed the robbers. "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." *Id.*, at 234. The State had no case without Shard's identification testimony,[9] and safeguards against that consequence were therefore of critical importance. Shard's testimony itself demonstrates the necessity for such safeguards. On direct examination, Shard identified petitioner and Bean not as the alleged robbers on trial in the courtroom, but as the pair he saw at the police station. His testimony thus lends strong support to the observation, quoted by the Court in *Wade*, 388 U. S., at 229, that "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 482.

The plurality today "decline[s] to depart from [the] rationale" of *Wade* and *Gilbert*. *Ante*, at 690. The plurality discovers that "rationale" not by consulting those decisions themselves, which would seem to be the appropriate course, but by reading one sentence in *Simmons* v. *United States*, 390 U. S. 377, 382–383 (1968), where no right-to-counsel claim was either asserted or considered. The "rationale" the plurality discovers is, appar-

[9] Bean took the stand and testified that he and petitioner found Shard's traveler's checks and Social Security card two hours before their arrest strewn upon the ground in an alley.

ently, that a post-indictment confrontation for identification is part of the prosecution. The plurality might have discovered a different "rationale" by reading one sentence in *Foster* v. *California,* 394 U. S. 440, 442 (1969), a case decided after *Simmons,* where the Court explained that in *Wade* and *Gilbert* "this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a 'critical stage' in the prosecution, at which the accused must be given the opportunity to be represented by counsel." In *Foster,* moreover, although the Court mentioned that the lineups took place after the accused's arrest, it did not say whether they were also after the information was filed against him.[10] Instead, the Court simply pointed out that under *Stovall* v. *Denno,* 388 U. S. 293 (1967), *Wade* and *Gilbert* were "applicable only to lineups conducted after those cases were decided." 394 U. S., at 442. Similarly, in *Coleman* v. *Alabama,* 399 U. S. 1 (1970), another case involving a pre-*Wade* lineup, no member of the Court saw any significance in whether the accused had been formally charged with a crime before the lineup was held.[11]

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[10] In fact, the lineups in *Foster* took place before the information was filed. The crime occurred on January 25, 1966. After the accused was arrested, he was exhibited to the witness in two lineups, both conducted within two weeks of January 25. The information was not filed until March 17. *Foster* v. *California,* No. 47, O. T. 1968, Brief for Respondent 3–8.

[11] In fact, the lineup in *Coleman* took place before the accused were formally charged. The crime occurred on July 24, 1966. The accused were arrested on September 29, and the lineup was held on October 1. The preliminary hearing was not until October 14, and the indictments were not returned until November 11. *Coleman* v. *Alabama,* No. 72, O. T. 1969, Brief for Petitioners 5–7; App. 84; see 399 U. S., at 26 (STEWART, J., joined by BURGER, C. J., dissenting).

On those facts, the plurality opinion adverted to the timing of the lineup only to the extent of pointing out that it was held "about two months after the assault and seven months before petitioners'

The plurality might also have discovered a different "rationale" for *Wade* and *Gilbert* had it examined *Stovall* v. *Denno, supra,* decided the same day. In *Stovall,* the confrontation for identification took place one day after the accused's arrest. Although the accused was first brought to an arraignment, it "was postponed until [he] could retain counsel." 388 U. S., at 295. Hence, in the plurality's terms today, the confrontation was held "before the commencement of any prosecution." *Ante,* at 690.[12] Yet in that circumstance the Court in *Stovall*

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trial." *Id.,* at 3 (BRENNAN, J., joined by DOUGLAS, WHITE, and MARSHALL, JJ.). The plurality opinion then simply noted that "[p]etitioners concede that since the lineup occurred before [*Wade* and *Gilbert*] were decided . . . , they cannot invoke the holding of those cases requiring the exclusion of in-court identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of counsel." *Id.,* at 3–4.

Mr. Justice Black in his concurring opinion took no notice at all of when the lineup was conducted. Instead, reiterating his view that *Wade* "should be held fully retroactive," he insisted "that petitioners in this pre-*Wade* case were entitled to court-appointed counsel at the time of the lineup in which they participated and that Alabama's failure to provide such counsel violated petitioners' rights under the Sixth and Fourteenth Amendments." *Id.,* at 13. Nor did Mr. Justice Harlan refer to the timing of the lineup in expressing his "dissent from the refusal to accord petitioners the benefit of the *Wade* holding, neither petitioner having been afforded counsel at the police 'lineup' identification." Mr. Justice Harlan's summary of *Wade,* like that of the prevailing opinion, did not limit its "rationale" to post-charge confrontations: "The *Wade* rule requires the exclusion of any in-court identification preceded by a pretrial lineup where the accused was not represented by counsel, unless the in-court identification is found to be derived from a source 'independent' of the tainted pretrial viewing." *Id.,* at 21.

[12] The chain of events in *Stovall* was as follows: The crime occurred on the night of August 23, 1961. The accused was arrested on the afternoon of August 24 and appeared for arraignment on the morning of August 25. The arraignment was postponed until August 31 so that he could retain counsel. The confrontation with the witness took place about noon on August 25. At the arraignment

stated that the accused raised "the same alleged constitutional errors in the admission of allegedly tainted identification evidence that were before us" in *Wade* and *Gilbert*. The Court therefore found that the case "provide[d] a vehicle for deciding the extent to which the rules announced in *Wade* and *Gilbert*—requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel—are to be applied retroactively." 388 U. S., at 294. Indeed, the Court's explicit holding was "that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date. The rulings of *Wade* and *Gilbert* are therefore inapplicable in the present case." *Id.*, at 296. Hence, the accused in *Stovall* did not receive the benefit of the new exclusionary rules because they were not applied retroactively; he was not denied their benefit because his confrontation took place before he had "been formally charged with a criminal offense." *Ante*, at 691. Moreover, in the course of its retroactivity discussion, 388 U. S., at 296–301, the Court repeated the phrase "pretrial confrontations for identification" or its equivalent no less than 10 times. Not once did the Court so much as hint that *Wade* and *Gilbert* applied only to confrontations after the accused "had been indicted or otherwise formally charged with [a] criminal offense." *Ante*, at 684. In fact, at one point the Court summarized *Wade* as holding "that the confrontation [for identification] is a 'critical stage,' and that counsel

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on August 31, the committing magistrate appointed counsel for the accused and set the felony examination for September 1. That examination was never held, for on August 31 the indictment was returned. *Stovall* v. *Denno*, No. 254, O. T. 1966, Brief for Respondent 34.

is required at *all* confrontations." 388 U. S., at 298 (emphasis added).

Wade and *Gilbert*, of course, happened to involve post-indictment confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance.[13] In short, it is fair to conclude that rather than "declin-[ing] to depart from [the] rationale" of *Wade* and *Gilbert*, *ante*, at 690, the plurality today, albeit purporting to be engaged in "principled constitutional adjudication," *id.*, at 688, refuses even to recognize that "rationale." For my part, I do not agree that we "extend" *Wade* and *Gilbert*, *id.*, at 684, by holding that the principles of those cases apply to confrontations for identification conducted after arrest.[14] Because Shard testified at trial

[13] The *Wade* dissenters found no such limitation: "The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information." *United States* v. *Wade*, 388 U. S., at 251 (WHITE, J., joined by Harlan and STEWART, JJ., dissenting in part and concurring in part).

[14] The plurality rather surprisingly asserts that "[t]he issue of the applicability of *Wade* and *Gilbert* to pre-indictment confrontation has *severely* divided the courts." *Ante*, at 687 n. 5 (emphasis added). As the plurality's citations reveal, there are decisions from five States, including Illinois, that have refused to apply *Wade* and *Gilbert* to pre-indictment confrontations for identification. Ranged against those five, however, are decisions from at least 13 States. See *People* v. *Fowler*, 1 Cal. 3d 335, 461 P. 2d 643 (1969); *State* v. *Singleton*, 253 La. 18, 215 So. 2d 838 (1968); *Commonwealth* v. *Guillory*, 356 Mass. 591, 254 N. E. 2d 427 (1970); *Palmer* v. *State*, 5 Md. App. 691, 249 A. 2d 482 (1969); *People* v. *Hutton*, 21 Mich. App. 312, 175 N. W. 2d 860 (1970); *Thompson* v. *State*, 85 Nev. 134, 451 P. 2d 704 (1969); *State* v. *Wright*, 274 N. C. 84, 161 S. E. 2d 581 (1968); *State* v. *Isaacs*, 24 Ohio App. 2d 115, 265 N. E. 2d 327 (1970); *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A. 2d 738 (1970); *In re Holley*, 107 R. I. 615, 268 A. 2d 723 (1970); *Martinez*

about his identification of petitioner at the police station showup, the exclusionary rule of *Gilbert*, 388 U. S., at 272–274, requires reversal.

MR. JUSTICE WHITE, dissenting.

United States v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), govern this case and compel reversal of the judgment below.

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v. *State*, 437 S. W. 2d 842 (Tex. Ct. Crim. App. 1969); *State* v. *Hicks*, 76 Wash. 2d 80, 455 P. 2d 943 (1969); *Hayes* v. *State*, 46 Wis. 2d 93, 175 N. W. 2d 625 (1970).

In addition, *every* United States Court of Appeals that has confronted the question has applied *Wade* and *Gilbert* to pre-indictment confrontations. See *United States* v. *Greene*, 139 U. S. App. D. C. 9, 429 F. 2d 193 (1970); *Cooper* v. *Picard*, 428 F. 2d 1351 (CA1 1970); *United States* v. *Ayers*, 426 F. 2d 524 (CA2 1970); *Government of Virgin Islands* v. *Callwood*, 440 F. 2d 1206 (CA3 1971); *Rivers* v. *United States*, 400 F. 2d 935 (CA5 1968); *United States* v. *Broadhead*, 413 F. 2d 1351 (CA7 1969); *United States* v. *Phillips*, 427 F. 2d 1035 (CA9 1970); *Wilson* v. *Gaffney*, 454 F. 2d 142 (CA10 1972). As Chief Judge Lewis, speaking for the Court of Appeals for the Tenth Circuit, put it in the last-cited case:

"In both *Wade* and *Gilbert* the lineups were conducted after indictments had been returned; in the case at bar, the lineup occurred before petitioner had been formally charged. But surely the assistance of counsel, now established as an absolute post-indictment right does not arise or attach because of the return of an indictment. The confrontation of a lineup . . . cannot have a constitutional distinction based upon the lodging of a formal charge. Every reason set forth by the Supreme Court in *Wade* . . . for the assistance of counsel post-indictment has equal or more impact when projected against a pre-indictment atmosphere. We hold that petitioner had a right to counsel at the lineup here considered." *Id.*, at 144.

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BRUNETTE MACHINE WORKS, LTD. *v.* KOCKUM INDUSTRIES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70-314. Argued March 23, 1972—Decided June 7, 1972

Title 28 U. S. C. § 1391 (d), providing that "[a]n alien may be sued in any district," embodies the long-established rule that a suit against an alien is wholly outside the operation of all federal venue laws (whether general or special) and governs the venue of an action for patent infringement against an alien. The District Court therefore erred in holding that § 1400 (b) (which provides that a patent infringement suit may be brought in the district of the defendant's residence, or where he has committed infringement acts and has a regular place of business) is the exclusive provision governing venue in patent infringement litigation. Pp. 708-714.

442 F. 2d 420, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

J. Pierre Kolisch argued the cause and filed briefs for petitioner.

Harry M. Cross, Jr., argued the cause and filed a brief for respondent.

Martin J. Adelman filed a brief for I.T.L. Industries Limited as *amicus curiae* urging reversal.

Curtis F. Prangley, Ronald A. Sandler, and *J. Terry Stratman* filed a brief for Amerace Esna Corp. as *amicus curiae* urging affirmance.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 1391 (d) of the United States Judicial Code provides that "[a]n alien may be sued in any district." Section 1400 (b) provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a

regular and established place of business." We are asked to decide which provision of Title 28 governs the venue of an action for patent infringement against an alien defendant.

Respondent Kockum Industries, Inc., an Alabama corporation doing business in Oregon, holds a United States patent on a machine that removes bark from logs. Kockum claims that petitioner Brunette Machine Works, Ltd., a Canadian corporation, has infringed that patent by assisting two American manufacturers to make and sell similar machines.[1] Kockum obtained service of process on Brunette in Oregon, under that State's long-arm statute, Ore. Rev. Stat. § 14.035, and filed this action for patent infringement in the United States District Court for the District of Oregon. The District Court dismissed the complaint on the ground of improper venue, accepting Brunette's contention that § 1400 (b) is the exclusive provision governing venue in patent infringement litigation, and that its requirements were not satisfied here.[2] The Court of Appeals reversed, holding that § 1391 (d) applies to patent infringement suits as to all others, and hence that Brunette is subject to suit as an alien in any district. 442 F. 2d 420 (1971). We granted certiorari to resolve a conflict in the circuits on this question.[3] 404 U. S. 982 (1971). We affirm.

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[1] Respondent's suit against one of those manufacturers, an Oregon corporation, is now pending on appeal to the Court of Appeals for the Ninth Circuit. *Kockum Industries, Inc.* v. *Salem Equipment, Inc.*, No. 25870.

[2] Petitioner does not "reside" in Oregon, because the residence of a corporation for purposes of § 1400 (b) is its place of incorporation. *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U. S. 222 (1957), discussed *infra*, at 711 and n. 10. And while the alleged infringement occurred in Oregon, petitioner apparently has no regular place of business there.

[3] Compare the decision of the Court of Appeals for the Ninth Circuit below with *Coulter Electronics, Inc.* v. *A. B. Lars Ljungberg & Co.*, 376 F. 2d 743 (CA7), cert. denied, 389 U. S. 859 (1967). Several

I

Section 1391 (d), providing that an alien may be sued in any district, appeared for the first time in the Judicial Code of 1948, but its roots go back to the beginning of the Republic. The first restrictions on venue in the federal courts were set forth in the Judiciary Act of 1789:

> "[N]o civil suit shall be brought before either [district or circuit] courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . ." 1 Stat. 79.[4]

Because this limitation on the place where federal cases might be tried applied in terms only to suits against "an inhabitant of the United States," suits against aliens were left unrestricted, and could be tried in any district, subject only to the requirements of service of process.

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district courts in other circuits have adopted the view taken by the Court of Appeals for the Ninth Circuit in this case, see *Chas. Pfizer & Co.* v. *Laboratori Pro-Ter Prodotti Therapeutici*, 278 F. Supp. 148 (SDNY 1967); *Olin Mathieson Chemical Corp.* v. *Molins Organizations, Ltd.*, 261 F. Supp. 436 (ED Va. 1966).

[4] The provision for venue wherever the defendant "shall be found" is deceptively broad. The grant of federal jurisdiction at that time consisted almost exclusively of suits between parties of diverse citizenship. Unlike the present statute, however, which provides for jurisdiction over suits "between . . . citizens of different States," 28 U. S. C. § 1332 (a)(1), the 1789 statute provided for jurisdiction over suits "between a citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 78. Thus the litigants were effectively confined to the district of residence of one of them, by the jurisdictional grant though not by the venue statutes. This restriction was eliminated in 1875, when a number of important changes were made in the Judiciary Act, see n. 5, *infra*, and the relevant clause of the grant of diversity jurisdiction was rephrased in its present form, 18 Stat. 470.

The original venue provisions remained essentially unchanged until 1875, when Congress substantially revised the Judiciary Act and greatly expanded the scope of federal jurisdiction. 18 Stat. 470.[5] In describing the class of cases subject to venue restrictions, the 1875 statute dropped the phrase "suit . . . against an inhabitant of the United States" and substituted "suit . . . against any person." This Court held, however, that the change was stylistic and not substantive, and that Congress did not thereby bring suits against aliens within the scope of the venue laws. *In re Hohorst*, 150 U. S. 653 (1893).

The Court offered two reasons in *Hohorst* for concluding that suits against aliens remained outside the scope of the venue laws. First, no contemporary significance appears to have attached to the relevant change in language in 1875.[6] Second, and perhaps more important, to hold the venue statutes applicable to suits against aliens would be in effect to oust the federal courts of jurisdiction in most cases, because the general venue provisions were framed with reference to the defendant's place of residence or citizenship, and an alien defendant is by definition a citizen of no district.[7] The

[5] The jurisdiction of the federal courts was extended to include suits "arising under the Constitution or laws of the United States," *i. e.*, the federal-question jurisdiction now found in 28 U. S. C. § 1331 (a). And the diversity jurisdiction was rephrased, see n. 4, *supra*.

[6] *In re Hohorst*, 150 U. S. 653, 661 (1893), citing *In re Louisville Underwriters*, 134 U. S. 488, 492 (1890), and *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 448 (1892), for the proposition that the substitution "has been assumed to be an immaterial change."

[7] In 1875, the restrictions on venue in the federal courts were those imposed by the 1789 statute quoted in text: suit could be brought where the defendant was an inhabitant, or where he could be found. In 1887, however, Congress eliminated the provision authorizing suit wherever the defendant could be found: federal-question cases could be brought only where the defendant was an

Hohorst Court reasoned that it should not lightly be assumed that Congress intended that result, in light of the fact that the venue provisions are designed, not to keep suits out of the federal courts, but merely to allocate suits to the most appropriate or convenient federal forum.[8]

The reasoning of *Hohorst* with respect to suits against aliens continues to have force today. It remains true today that to hold the venue statutes applicable here would in effect oust the federal courts of a jurisdiction clearly conferred on them by Congress. Moreover, in the 79 years since *Hohorst* was decided, Congress has never given the slightest indication that it is dissatisfied

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"inhabitant," and diversity cases only where either the plaintiff or the defendant resides. 24 Stat. 552. A suit against an alien was not regarded as a true diversity suit, and hence it was necessary to satisfy the requirements of federal-question venue, *i. e.*, residence of the defendant. *Hohorst, supra,* at 660.

Today the general venue provisions for federal-question and diversity cases appear in 28 U. S. C. §§ 1391 (a) and (b); they follow the 1887 statute, except that Congress has added a provision for venue where "the claim arose," see n. 8, *infra.*

[8] There have been, and perhaps there still are, occasional gaps in the venue laws, *i. e.*, cases in which the federal courts have jurisdiction but there is no district in which venue is proper. One such gap arose in connection with cases involving multiple plaintiffs and defendants. Venue was fixed at the residence of the defendant, or in diversity cases at the residence of the plaintiff as well. When there were multiple plaintiffs or defendants, the district of residence for venue purposes was the district where *all* plaintiffs or *all* defendants reside. *Smith* v. *Lyon,* 133 U. S. 315 (1890). If they resided in different districts then there was no proper venue. In 1966 Congress acted to close the gap with a provision authorizing suit where "the claim arose," 80 Stat. 1111, which in most cases provides a proper venue even in multiple-party situations. The development supports the view that Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.

with the longstanding judicial view that the 1789 language continues to color the venue statutes, with the result that suits against aliens are outside the scope of all the venue laws.

II

Petitioner argues that by enacting 28 U. S. C. § 1400 (b), Congress indicated a legislative intent to reject that rule in patent cases, and regulate the venue of suits against aliens in that limited class of cases. There is support for petitioner's argument in the broad language of prior decisions of this Court. Twice before, the Court has refused to apply venue provisions of general applicability to patent infringement cases. In *Stonite Prods. Co.* v. *Lloyd Co.*, 315 U. S. 561 (1942), the Court declared that what is now § 1400 (b) is "the exclusive provision controlling venue in patent infringement proceedings." *Id.*, at 563. *Stonite* held that venue in patent cases is not affected by what is now § 1392 (a), which relaxes certain restrictive venue rules in cases involving multiple defendants.[9] Similarly, in *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U. S. 222 (1957), the Court asserted that "28 U. S. C. § 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions," emphasizing its character as "a special venue statute applicable, specifically, to *all* defendants in a particular type of actions," *id.*, at 228, 229 (emphasis in original). *Fourco* held that venue in patent cases is not affected by § 1391 (c), which expands for general venue purposes the definition of the residence of a corporation.[10]

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[9] Section 1392 (a), originally 11 Stat. 272 (1858), affords some relief in a very small class of cases that fall in the gap described in n. 8, *supra*. When multiple defendants reside in different districts *within the same State*, the suit may be brought in any one of them.

[10] Section 1391 (c), enacted 62 Stat. 935 (1948), provides:

"A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such

The analysis in each case rested heavily on the legislative history of § 1400 (b). Prior to 1893, patent infringement cases had been widely, though not universally, regarded as subject to the general federal venue statutes. *Chaffee* v. *Hayward,* 20 How. 208, 215–216 (1858). This Court cast doubt on that proposition, however, in the *Hohorst* case, *supra.* We have already noted that *Hohorst* held the general venue limitations inapplicable to a suit against an alien defendant.[11] In further support of the decision, however, the Court noted that the suit was based on a claim for patent infringement; the venue restrictions, said the Court, were intended to apply only to that part of the federal jurisdiction that was concurrent with state court jurisdiction, and not to patent suits, which are entrusted exclusively to the federal courts.

The apparent effect of the decision was to hold that patent infringement suits could be tried in any district, even when the defendant was not an alien. After *Hohorst,* there was great confusion on this point in the lower courts.[12] Congress responded promptly, creating a special new venue statute for the occasion: patent infringement claims were to be heard only in the district where the defendant was an inhabitant, or the district where he committed acts of infringement and also maintained a regular and established place of business. 29 Stat. 695 (1897), now codified as 28 U. S. C. § 1400 (b). The new provision was of course more restrictive than the law as it was left by *Hohorst,* but it was rather less restrictive than the general venue provision then applicable to claims arising under

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judicial district shall be regarded as the residence of such corporation for venue purposes."

[11] See *supra,* at 709–710.

[12] See *Stonite Prods. Co.* v. *Lloyd Co.,* 315 U. S. 561, 564–565 (1942); conflicting decisions collected at 29 Cong. Rec. 1901 (1897).

federal law.[13] Over the objections of some legislators, who could see no reason for treating patent suits differently from any other federal-question litigation,[14] Congress took the opportunity to establish for patent infringement suits a special and separate venue statute. Thus it is fair to say, as the Court did in *Stonite* and *Fourco,* that in 1897 Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation.

But that analysis sheds no light on the present case. For it totally misconceives the origin and purpose of § 1391 (d) to characterize that statute as an appendage to the general venue statutes, analogous to the provisions at issue in *Stonite* and *Fourco.* Section 1391 (d) is not derived from the general venue statutes that § 1400 (b) was intended to replace. Section 1391 (d) reflects, rather, the longstanding rule that suits against alien defendants are outside those statutes. Since the general venue statutes did not reach suits against alien defendants, there is no reason to suppose the new substitute in patent cases was intended to do so. Indeed, the only glimmer of evidence of legislative intent points in the other direction. We have no reliable indication of what Congress thought about the matter in 1875, when it

[13] Venue in a federal-question case was at that time proper only where the defendant was an inhabitant, 24 Stat. 552 (1887), as corrected, 25 Stat. 434 (1888). Thus, the new statute gave patent claimants an advantage by authorizing as an additional venue alternative any district where the defendant maintained a regular place of business, and committed acts of infringement. Ironically, changes in the general venue law have left the patent venue statute far behind. Since 1948, the general venue law has authorized suit against a corporate defendant not only where he maintains a "regular and established place of business," as in § 1400 (b), but also where he is "doing business." 62 Stat. 935, now § 1391 (c). And since 1966, the general venue law has authorized suit where "the claim arose," see n. 8, *supra.*

[14] See 29 Cong. Rec. 1901 (remarks of Cong. Payne).

dropped the language that expressly excluded suits against alien defendants from the general venue statutes, or in 1897, when it enacted the special patent venue statute. But in 1948, Congress was apparently quite content to leave suits against alien defendants exempt from the venue statutes, in patent cases as in all others. In that year, Congress codified as § 1391 (d) the rule exempting suits against aliens from the federal venue statutes. The Reviser's Notes, which provide the principal guide to interpretation of the 1948 Judicial Code, explain the intent to codify a rule that commands the "weight of authority," citing a pair of district court cases. These cases hold that the general venue laws do not control in a suit against an alien defendant, nor does the special patent venue law. *Sandusky Foundry & Machine Co.* v. *DeLavaud,* 251 F. 631 (ND Ohio 1918); *Keating* v. *Pennsylvania Co.,* 245 F. 155 (ND Ohio 1917).

III

We conclude that in § 1391 (d) Congress was stating a principle of broad and overriding application, and not merely making an adjustment in the general venue statute, as this Court found Congress had done in *Stonite* and *Fourco.* The principle of § 1391 (d) cannot be confined in its application to cases that would otherwise fall under the general venue statutes. For § 1391 (d) is properly regarded, not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.

That rule, which has prevailed throughout the history of the federal courts, controls this case. Since respondent Brunette is an alien corporation, it cannot rely on § 1400 (b) as a shield against suit in the District of Oregon. The judgment of the Court of Appeals is

Affirmed.

JACKSON *v.* INDIANA

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 70–5009. Argued November 18, 1971—Decided June 7, 1972

The Indiana procedure for pretrial commitment of incompetent criminal defendants set forth in Ind. Ann. Stat. § 9–1706a provides that a trial judge with "reasonable ground" to believe the defendant to be incompetent to stand trial must appoint two examining physicians and schedule a competency hearing, at which the defendant may introduce evidence. If the court, on the basis of the physicians' report and "other evidence," finds that the defendant lacks "comprehension sufficient to understand the proceedings and make his defense," the trial is delayed and the defendant is remanded to the state department of mental health for commitment to an "appropriate psychiatric institution" until defendant shall become "sane." Other statutory provisions apply to commitment of citizens who are "feeble-minded, and are therefore unable properly to care for themselves." The procedures for committing such persons are substantially similar to those for determining a criminal defendant's pretrial competency, but a person committed as "feeble-minded" may be released "at any time" his condition warrants it in the judgment of the superintendent of the institution. Indiana also has a comprehensive commitment scheme for the "mentally ill," *i. e.*, those with a "psychiatric disorder" as defined by the statute, who can be committed on a showing of mental illness and need for "care, treatment, training or detention." A person so committed may be released when the superintendent of the institution shall discharge him, or when he is cured. Petitioner in this case, a mentally defective deaf mute, who cannot read, write, or virtually otherwise communicate, was charged with two criminal offenses and committed under the § 9–1706a procedure. The doctors' report showed that petitioner's condition precluded his understanding the nature of the charges against him or participating in his defense and their testimony showed that the prognosis was "rather dim"; that even if petitioner were not a deaf mute he would be incompetent to stand trial; and that petitioner's intelligence was not sufficient to enable him ever to develop the necessary communication skills. According to a deaf-school interpreter's testimony, the State had no facilities that could help peti-

tioner learn minimal communication skills. After finding that petitioner "lack[ed] comprehension sufficient to make his defense," the court ordered petitioner committed until such time as the health department could certify petitioner's sanity to the court. Petitioner's counsel filed a motion for a new trial, which was denied. The State Supreme Court affirmed. Contending that his commitment was tantamount to a "life sentence" without his having been convicted of a crime, petitioner claims that commitment under § 9–1706a deprived him of equal protection because, absent the criminal charges against him, the State would have had to proceed under the other statutory procedures for the feeble-minded or those for the mentally ill, under either of which petitioner would have been entitled to substantially greater rights. Petitioner also asserts that indefinite commitment under the section deprived him of due process and subjected him to cruel and unusual punishment. *Held:*

1. By subjecting petitioner to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all other persons not charged with offenses, thus condemning petitioner to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by ordinary civil commitment procedures, Indiana deprived petitioner of equal protection. Cf. *Baxstrom* v. *Herold,* 383 U. S. 107. Pp. 723–731.

2. Indiana's indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. Such a defendant cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. If it is determined that he will not, the State must either institute civil proceedings applicable to indefinite commitment of those not charged with crime, or release the defendant. *Greenwood* v. *United States,* 350 U. S. 366, distinguished. Pp. 731–739.

3. Since the issue of petitioner's criminal responsibility at the time of the alleged offenses (as distinguished from the issue of his competency to stand trial) has not been determined and other matters of defense may remain to be resolved, it would be premature for this Court to dismiss the charges against petitioner. Pp. 739–741.

253 Ind. 487, 255 N. E. 2d 515, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which all Members joined except POWELL and REHNQUIST, JJ., who took no part in the consideration or decision of the case.

Frank E. Spencer argued the cause for petitioner. With him on the brief were *Robert Hollowell, Jr.*, and *Robert Robinson.*

Sheldon A. Breskow argued the cause for respondent. On the brief were *Theodore L. Sendak,* Attorney General of Indiana, and *William F. Thompson,* Assistant Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

We are here concerned with the constitutionality of certain aspects of Indiana's system for pretrial commitment of one accused of crime.

Petitioner, Theon Jackson, is a mentally defective deaf mute with a mental level of a pre-school child. He cannot read, write, or otherwise communicate except through limited sign language. In May 1968, at age 27, he was charged in the Criminal Court of Marion County, Indiana, with separate robberies of two women. The offenses were alleged to have occurred the preceding July. The first involved property (a purse and its contents) of the value of four dollars. The second concerned five dollars in money. The record sheds no light on these charges since, upon receipt of not-guilty pleas from Jackson, the trial court set in motion the Indiana procedures for determining his competency to stand trial. Ind. Ann. Stat. § 9–1706a (Supp. 1971),[1] now Ind. Code 35–5–3–2 (1971).

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[1] "9–1706a. Commitment before trial—Subsequent actions.—When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowl-

As the statute requires, the court appointed two psychiatrists to examine Jackson. A competency hearing was subsequently held at which petitioner was represented by counsel. The court received the examining doctors' joint written report and oral testimony from them and from a deaf-school interpreter through whom they had attempted to communicate with petitioner. The report concluded that Jackson's almost nonexistent communication skill, together with his lack of hearing and his mental deficiency, left him unable to understand the nature of the charges against him or to participate in his defense. One doctor testified that it was extremely

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edge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two [2] competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing, other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution. Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity."

unlikely that petitioner could ever learn to read or write and questioned whether petitioner even had the ability to develop any proficiency in sign language. He believed that the interpreter had not been able to communicate with petitioner to any great extent and testified that petitioner's "prognosis appears rather dim." The other doctor testified that even if Jackson were not a deaf mute, he would be incompetent to stand trial, and doubted whether petitioner had sufficient intelligence ever to develop the necessary communication skills. The interpreter testified that Indiana had no facilities that could help someone as badly off as Jackson to learn minimal communication skills.

On this evidence, the trial court found that Jackson "lack[ed] comprehension sufficient to make his defense," § 9–1706a, and ordered him committed to the Indiana Department of Mental Health until such time as that Department should certify to the court that "the defendant is sane."

Petitioner's counsel then filed a motion for a new trial, contending that there was no evidence that Jackson was "insane," or that he would ever attain a status which the court might regard as "sane" in the sense of competency to stand trial. Counsel argued that Jackson's commitment under these circumstances amounted to a "life sentence" without his ever having been convicted of a crime, and that the commitment therefore deprived Jackson of his Fourteenth Amendment rights to due process and equal protection, and constituted cruel and unusual punishment under the Eighth Amendment made applicable to the States through the Fourteenth. The trial court denied the motion. On appeal the Supreme Court of Indiana affirmed, with one judge dissenting. 253 Ind. 487, 255 N. E. 2d 515 (1970). Rehearing was denied, with two judges dissenting. We granted certiorari, 401 U. S. 973 (1971).

For the reasons set forth below, we conclude that, on the record before us, Indiana cannot constitutionally commit the petitioner for an indefinite period simply on account of his incompetency to stand trial on the charges filed against him. Accordingly, we reverse.

I

Indiana Commitment Procedures

Section 9–1706a contains both the procedural and substantive requirements for pretrial commitment of incompetent criminal defendants in Indiana. If at any time before submission of the case to the court or jury the trial judge has "reasonable ground" to believe the defendant "to be insane," [2] he must appoint two examining physicians and schedule a competency hearing. The hearing is to the court alone, without a jury. The examining physicians' testimony and "other evidence" may be adduced on the issue of incompetency. If the court finds the defendant "has not comprehension sufficient to understand the proceedings and make his defense," trial is delayed or continued and the defendant is remanded to the state department of mental health to be confined in an "appropriate psychiatric institution." The section further provides that "[w]henever the defendant shall become sane" the superintendent of the institution shall certify that fact to the court, and the court shall order him brought on to trial. The court may also make such an order *sua sponte*. There is no statutory provision for periodic review of the defendant's condition by either the court or mental health authorities. Section 9–1706a by its terms does not accord the

[2] The section refers at several points to the defendant's "sanity." This term is nowhere defined. In context, and in the absence of a contrary statutory construction by the state courts, it appears that the term is intended to be synonymous with competence to stand trial.

defendant any right to counsel at the competency hearing or otherwise describe the nature of the hearing; but Jackson was represented by counsel who cross-examined the testifying doctors carefully and called witnesses on behalf of the petitioner-defendant.

Petitioner's central contention is that the State, in seeking in effect to commit him to a mental institution indefinitely, should have been required to invoke the standards and procedures of Ind. Ann. Stat. § 22–1907, now Ind. Code 16–15–1–3 (1971), governing commitment of "feeble-minded" persons. That section provides that upon application of a "reputable citizen of the county" and accompanying certificate of a reputable physician that a person is "feeble-minded and is *not insane* or epileptic" (emphasis supplied), a circuit court judge shall appoint two physicians to examine such person. After notice, a hearing is held at which the patient is entitled to be represented by counsel. If the judge determines that the individual is indeed "feeble-minded," he enters an order of commitment and directs the clerk of the court to apply for the person's admission "to the superintendent of the institution for feeble-minded persons located in the district in which said county is situated." A person committed under this section may be released "at any time," provided that "in the judgment of the superintendent, the mental and physical condition of the patient justifies it." § 22–1814, now Ind. Code 16–15–4–12 (1971). The statutes do not define either "feeble-mindedness" or "insanity" as used in § 22–1907. But a statute establishing a special institution for care of such persons, § 22–1801, refers to the duty of the State to provide care for its citizens who are "feeble-minded, and are therefore unable properly to care for themselves." [3]

[3] Sections 22–1801 and 22–1907 would appear to be interdependent. See Official Opinion No. 49, Opinions of the Attorney General of Indiana, Sept. 26, 1958.

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These provisions evidently afford the State a vehicle for commitment of persons in need of custodial care who are "not insane" and therefore do not qualify as "mentally ill" under the State's general involuntary civil commitment scheme. See §§ 22–1201 to 22–1256, now Ind. Code 16–14–9–1 to 16–14–9–31, 16–13–2–9 to 16–13–2–10, 35–5–3–4, 16–14–14–1 to 16–14–14–19, and 16–14–15–5, 16–14–15–1, and 16–14–19–1 (1971).

Scant attention was paid this general civil commitment law by the Indiana courts in the present case. An understanding of it, however, is essential to a full airing of the equal protection claims raised by petitioner. Section 22–1201 (1) defines a "mentally ill person" as one who

> "is afflicted with a psychiatric disorder which substantially impairs his mental health; and, because of such psychiatric disorder, requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the community in which such person resides."

Section 22–1201 (2) defines a "psychiatric disorder" to be any mental illness or disease, including any mental deficiency, epilepsy, alcoholism, or drug addiction. Other sections specify procedures for involuntary commitment of "mentally ill" persons that are substantially similar to those for commitment of the feeble-minded. For example, a citizen's sworn statement and the statement of a physician are required. § 22–1212. The circuit court judge, the applicant, and the physician then consult to formulate a treatment plan. § 22–1213. Notice to the individual is required, § 22–1216, and he is examined by two physicians, § 22–1215. There are provisions for temporary commitment. A hearing is held before a judge on the issue of mental illness. §§ 22–1209, 22–1216, 22–1217. The individual has a right of ap-

peal. § 22–1210. An individual adjudged mentally ill under these sections is remanded to the department of mental health for assignment to an appropriate institution. § 22–1209. Discharge is in the discretion of the superintendent of the particular institution to which the person is assigned, § 22–1223; Official Opinion No. 54, Opinions of the Attorney General of Indiana, Dec. 30, 1966. The individual, however, remains within the court's custody, and release can therefore be revoked upon a hearing. *Ibid.*

II

Equal Protection

Because the evidence established little likelihood of improvement in petitioner's condition, he argues that commitment under § 9–1706a in his case amounted to a commitment for life. This deprived him of equal protection, he contends, because, absent the criminal charges pending against him, the State would have had to proceed under other statutes generally applicable to all other citizens: either the commitment procedures for feeble-minded persons, or those for mentally ill persons. He argues that under these other statutes (1) the decision whether to commit would have been made according to a different standard, (2) if commitment were warranted, applicable standards for release would have been more lenient, (3) if committed under § 22–1907, he could have been assigned to a special institution affording appropriate care, and (4) he would then have been entitled to certain privileges not now available to him.

In *Baxstrom* v. *Herold*, 383 U. S. 107 (1966), the Court held that a state prisoner civilly committed at the end of his prison sentence on the finding of a surrogate was denied equal protection when he was deprived of a jury trial that the State made generally available

to all other persons civilly committed. Rejecting the State's argument that Baxstrom's conviction and sentence constituted adequate justification for the difference in procedures, the Court said that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." 383 U. S., at 111–112; see *United States ex rel. Schuster* v. *Herold,* 410 F. 2d 1071 (CA2), cert. denied, 396 U. S. 847 (1969). The Court also held that Baxstrom was denied equal protection by commitment to an institution maintained by the state corrections department for "dangerously mentally ill" persons, without a judicial determination of his "dangerous propensities" afforded all others so committed.

If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice. This was the precise holding of the Massachusetts Court in *Commonwealth* v. *Druken,* 356 Mass. 503, 507, 254 N. E. 2d 779, 781 (1969).[4] The *Baxstrom* principle also has been extended to commitment following an insanity acquittal, *Bolton* v. *Harris,* 130 U. S. App. D. C. 1, 395 F. 2d 642 (1968); *Cameron* v. *Mullen,* 128 U. S. App. D. C. 235, 387 F. 2d 193 (1967); *People* v. *Lally,* 19 N. Y. 2d 27, 224 N. E. 2d 87 (1966), and to commitment in lieu of sentence fol-

[4] See also Association of the Bar, City of New York, Special Committee on the Study of Commitment Procedures and the Law Relating to Incompetents, Second Report, Mental Illness, Due Process and the Criminal Defendant 1 (1968) (hereafter N. Y. Report):

"The basic and unifying thread which runs throughout our recommendations is a rejection of the notion that the mere fact of a criminal charge or conviction is a proper basis upon which to build other unnecessary, unprofitable, and essentially unfair distinctions among the mentally ill."

lowing conviction as a sex offender. *Humphrey* v. *Cady*, 405 U. S. 504 (1972).

Respondent argues, however, that because the record fails to establish affirmatively that Jackson will never improve, his commitment "until sane" is not really an indeterminate one. It is only temporary, pending possible change in his condition. Thus, presumably, it cannot be judged against commitments under other state statutes that are truly indeterminate. The State relies on the lack of "exactitude" with which psychiatry can predict the future course of mental illness, and on the Court's decision in what is claimed to be "a fact situation similar to the case at hand" in *Greenwood* v. *United States*, 350 U. S. 366 (1956).

Were the State's factual premise that Jackson's commitment is only temporary a valid one, this might well be a different case. But the record does not support that premise. One of the doctors testified that in his view Jackson would be unable to acquire the substantially improved communication skills that would be necessary for him to participate in any defense. The prognosis for petitioner's developing such skills, he testified, appeared "rather dim." In answer to a question whether Jackson would ever be able to comprehend the charges or participate in his defense, even after commitment and treatment, the doctor said, "I doubt it, I don't believe so." The other psychiatrist testified that even if Jackson were able to develop such skills, he would *still* be unable to comprehend the proceedings or aid counsel due to his mental deficiency. The interpreter, a supervising teacher at the state school for the deaf, said that he would not be able to serve as an interpreter for Jackson or aid him in participating in a trial, and that the State had no facilities that could, "after a length of time," aid Jackson in so participating. The court also heard petitioner's mother testify that

Jackson already had undergone rudimentary out-patient training in communications skills from the deaf and dumb school in Indianapolis over a period of three years without noticeable success. There is nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time.

Nor does *Greenwood*,[5] which concerned the constitutional validity of 18 U. S. C. §§ 4244 to 4248, lend support to respondent's position. That decision, addressing the "narrow constitutional issue raised by the order of commitment in the circumstances of this case," 350 U. S., at 375, upheld the Federal Government's constitutional authority to commit an individual found by the District Court to be "insane," incompetent to stand trial on outstanding criminal charges, and probably dangerous to the safety of the officers, property, or other interests of the United States. The *Greenwood* Court construed the federal statutes to deal "comprehensively" with defendants "who are insane or mentally incompetent to stand trial," and not merely with "the problem of temporary mental disorder." 350 U. S., at 373. Though Greenwood's prospects for improvement were slim, the Court held that "in the situation before us," where the District Court had made an explicit finding of dangerousness, that fact alone "does not defeat federal power to make this initial commitment." 350 U. S., at 375. No issue of equal protection was raised or decided. See Petitioner's Brief, No. 460, O. T. 1955, pp. 2, 7–9. It is clear that the Government's substantive power to commit on the particular findings made in that case was the sole question there decided. 350 U. S., at 376.

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[5] This case is further discussed in connection with the due process claim. See Part III.

We note also that neither the Indiana statute nor state practice makes the likelihood of the defendant's improvement a relevant factor. The State did not seek to make any such showing, and the record clearly establishes that the chances of Jackson's ever meeting the competency standards of § 9–1706a are at best minimal, if not nonexistent. The record also rebuts any contention that the commitment could contribute to Jackson's improvement. Jackson's § 9–1706a commitment is permanent in practical effect.

We therefore must turn to the question whether, because of the pendency of the criminal charges that triggered the State's invocation of § 9–1706a, Jackson was deprived of substantial rights to which he would have been entitled under either of the other two state commitment statutes. *Baxstrom* held that the State cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others. In this case commitment procedures under all three statutes appear substantially similar: notice, examination by two doctors, and a full judicial hearing at which the individual is represented by counsel and can cross-examine witnesses and introduce evidence. Under each of the three statutes, the commitment determination is made by the court alone, and appellate review is available.

In contrast, however, what the State must show to commit a defendant under § 9–1706a, and the circumstances under which an individual so committed may be released, are substantially different from the standards under the other two statutes.

Under § 9–1706a, the State needed to show only Jackson's inability to stand trial. We are unable to say that, on the record before us, Indiana could have civilly committed him as mentally ill under § 22–1209 or committed him as feeble-minded under § 22–1907. The

former requires at least (1) a showing of mental illness and (2) a showing that the individual is in need of "care, treatment, training or detention." § 22–1201 (1). Whether Jackson's mental deficiency would meet the first test is unclear; neither examining physician addressed himself to this. Furthermore, it is problematical whether commitment for "treatment" or "training" would be appropriate since the record establishes that none is available for Jackson's condition at any state institution. The record also fails to establish that Jackson is in need of custodial care or "detention." He has been employed at times, and there is no evidence that the care he long received at home has become inadequate. The statute appears to require an independent showing of dangerousness ("requires . . . detention in the interest of the welfare of such person or . . . others . . ."). Insofar as it may require such a showing, the pending criminal charges are insufficient to establish it, and no other supporting evidence was introduced. For the same reasons, we cannot say that this record would support a feeble-mindedness commitment under § 22–1907 on the ground that Jackson is "unable properly to care for [himself]."[6] § 22–1801.

More important, an individual committed as feeble-minded is eligible for release when his condition "justifies it," § 22–1814, and an individual civilly committed as mentally ill when the "superintendent or administra-

[6] Perhaps some confusion on this point is engendered by the fact that Jackson's counsel, far from asserting that the State could *not* commit him as feeble-minded under § 22–1907, actively sought such a commitment in the hope that Jackson would be assured assignment to a special institution. The Indiana Supreme Court thought this concern unnecessary. In any event, we do not suggest that a feeble-mindedness commitment would be inappropriate. We note only that there is nothing in *this* record to establish the need for custodial care that such a commitment seems to require under §§ 22–1907 and 22–1801.

tor shall discharge such person, *or* [when] cured of such illness." § 22–1223 (emphasis supplied). Thus, in either case release is appropriate when the individual no longer requires the custodial care or treatment or detention that occasioned the commitment, or when the department of mental health believes release would be in his best interests. The evidence available concerning Jackson's past employment and home care strongly suggests that under these standards he might be eligible for release at almost any time, even if he did not improve.[7] On the other hand, by the terms of his present § 9–1706a commitment, he will not be entitled to release at all, absent an unlikely substantial change for the better in his condition.[8]

Baxstrom did not deal with the standard for release, but its rationale is applicable here. The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him a substantial opportunity for early release.

As we noted above, we cannot conclude that pending criminal charges provide a greater justification for dif-

[7] See President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (1969).

[8] Respondent argues that Jackson would not in fact be eligible for release under § 22–1907 or § 22–1223 if he did not improve since, if the authorities could not communicate with him, they could not decide whether his condition "justified" release. Respondent further argues that because no state court has ever construed the release provisions of any of the statutes, we are barred from relying upon any differences between them. This line of reasoning is unpersuasive. The plain language of the provisions, when applied to Jackson's particular history and condition, dictates different results. No state court has held that an Indiana defendant committed as incompetent is eligible for release when he no longer needs custodial care or treatment. The commitment order here clearly makes release dependent upon Jackson's regaining competency to stand trial.

ferent treatment than conviction and sentence. Consequently, we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by § 22–1209 or § 22–1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.[9]

[9] Petitioner also argues that the incompetency commitment deprived him of the right to be assigned to a special "institution for feeble-minded persons" to which he would have been statutorily directed by a § 22–1907 commitment. The State maintains two such institutions. The Indiana Supreme Court thought petitioner "failed to understand the statutory mechanisms" for assignment following commitment under the two procedures. 253 Ind., at 490, 255 N. E. 2d, at 517. It observed that since the mental health department now administers, in consolidated fashion, all the State's mental facilities including the two special institutions, see § 22–5001 to § 22–5036, now Ind. Code 16–13–1–1 to 16–13–1–31, 16–13–2–1, 16–13–2–7 to 16–13–2–8, 16–14–18–3 to 16–14–18–4 (1971), and since the special institutions are "appropriate psychiatric institutions" under § 9–1706a, considering Jackson's condition, his incompetency commitment can still culminate in assignment to a special facility. The State, in argument, went one step further. It contended that in practice the assignment process under all three statutes is identical: the individual is remanded to the central state authority, which assigns him to an appropriate institution regardless of how he was committed.

If true, such practice appears at first blush contrary to the mandate of § 22–1907, requiring the court clerk to seek assignment at one of the two special institutions. However, the relevant statutes, including that effecting consolidation of all mental health facilities under one department, have been enacted piecemeal, and older laws often not formally revised. Since the department of mental health has sole discretionary authority to transfer patients between any of the institutions it administers at any time, § 22–5032 (6) and § 22–301, there is evidently adequate statutory authority for consolidating the initial assignment decision.

Moreover, nothing in the record demonstrates that different or

III

Due Process

For reasons closely related to those discussed in Part II above, we also hold that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process.

A. *The Federal System.* In the federal criminal system, the constitutional issue posed here has not been encountered precisely because the federal statutes have been construed to require that a mentally incompetent defendant must also be found "dangerous" before he can be committed indefinitely. But the decisions have uniformly articulated the constitutional problems compelling this statutory interpretation.

The federal statute, 18 U. S. C. §§ 4244 to 4246, is not dissimilar to the Indiana law. It provides that a defendant found incompetent to stand trial may be committed "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." § 4246. Section

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better treatment is available at a special institution than at the general facilities for the mentally ill. We are not faced here, as we were in *Baxstrom*, with commitment to a distinctly penal or maximum-security institution designed for dangerous inmates and not administered by the general state mental health authorities. Therefore, we cannot say that by virtue of his incompetency commitment Jackson has been denied an assignment or appropriate treatment to which those not charged with crimes would generally be entitled.

Similarly, Jackson's incompetency commitment did not deprive him of privileges such as furloughs to which he claims a feeble-mindedness commitment would entitle him. The statutes relate such privileges to particular institutions, not to the method of commitment. Thus patients assigned to the Muscatatuck institution are entitled to furloughs regardless of the statute under which they were committed; and persons committed as feeble-minded would not be entitled to furloughs if assigned to a general mental institution.

4247, applicable on its face only to convicted criminals whose federal sentences are about to expire, permits commitment if the prisoner is (1) "insane or mentally incompetent" and (2) "will probably endanger the safety of the officers, the property, or other interests of the United States, and . . . suitable arrangements for the custody and care of the prisoner are not otherwise available," that is, in a state facility. See *Greenwood* v. *United States*, 350 U. S., at 373–374. One committed under this section, however, is entitled to release when any of the three conditions no longer obtains, "whichever event shall first occur." § 4248. Thus, a person committed under § 4247 must be released when he no longer is "dangerous."

In *Greenwood*, the Court upheld the pretrial commitment of a defendant who met all three conditions of § 4247, even though there was little likelihood that he would ever become competent to stand trial. Since Greenwood had not yet stood trial, his commitment was ostensibly under § 4244. By the related release provision, § 4246, he could not have been released until he became competent. But the District Court had in fact applied § 4247, and found specifically that Greenwood would be dangerous if not committed. This Court approved that approach, holding § 4247 applicable before trial as well as to those about to be released from sentence. 350 U. S., at 374. Accordingly, Greenwood was entitled to release when no longer dangerous, § 4248, even if he did not become competent to stand trial and thus did not meet the requirement of § 4246. Under these circumstances, the Court found the commitment constitutional.

Since *Greenwood*, federal courts without exception have found improper any straightforward application of §§ 4244 and 4246 to a defendant whose chance of attaining competency to stand trial is slim, thus effect-

ing an indefinite commitment on the ground of incompetency alone. *United States* v. *Curry*, 410 F. 2d 1372 (CA4 1969); *United States* v. *Walker*, 335 F. Supp. 705 (ND Cal. 1971); *Cook* v. *Ciccone*, 312 F. Supp. 822 (WD Mo. 1970); *United States* v. *Jackson*, 306 F. Supp. 4 (ND Cal. 1969); *Maurietta* v. *Ciccone*, 305 F. Supp. 775 (WD Mo. 1969). See *In re Harmon*, 425 F. 2d 916 (CA1 1970); *United States* v. *Klein*, 325 F. 2d 283 (CA2 1963); *Martin* v. *Settle*, 192 F. Supp. 156 (WD Mo. 1961); *Royal* v. *Settle*, 192 F. Supp. 176 (WD Mo. 1959). The holding in each of these cases was grounded in an expressed substantial doubt that §§ 4244 and 4246 could survive constitutional scrutiny if interpreted to authorize indefinite commitment.

These decisions have imposed a "rule of reasonableness" upon §§ 4244 and 4246. Without a finding of dangerousness, one committed thereunder can be held only for a "reasonable period of time" necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not in fact improve, then he must be released or granted a §§ 4247–4248 hearing.

B. *The States.* Some States [10] appear to commit indefinitely a defendant found incompetent to stand trial until he recovers competency. Other States require a finding of dangerousness to support such a commitment [11] or provide forms of parole.[12] New York has recently

[10] Cal. Penal Code §§ 1370, 1371 (1970); Conn. Gen. Stat. Rev. § 54–40 (c) (1958); Minn. Stat. Ann. § 631.18 (Supp. 1972–1973); N. J. Rev. Stat. § 2A:163–2 (1971); Ohio Rev. Code Ann. §§ 2945.37 and 2945.38 (1954); Wis. Stat. Ann. § 971.14 (1971). See Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454 (1967).

[11] Iowa Code Ann. § 783.3 (Supp. 1972); Okla. Stat. Ann., Tit. 22, § 1167 (1958); S. D. Comp. Laws Ann. § 23–38–6 (1967).

[12] Mich. Comp. Laws Ann. § 767.27a (8) (1967); Ore. Rev. Stat. § 426.300 (1) (1971); Wis. Stat. Ann. § 51.21 (6) (Supp. 1972).

enacted legislation mandating release of incompetent defendants charged with misdemeanors after 90 days of commitment, and release and dismissal of charges against those accused of felonies after they have been committed for two-thirds of the maximum potential prison sentence.[13] The practice of automatic commitment with release conditioned solely upon attainment of competence has been decried on both policy and constitutional grounds.[14] Recommendations for changes made by commentators and study committees have included incorporation into pretrial commitment procedures of the equivalent of the federal "rule of reason," a requirement of a finding of dangerousness or of full-scale civil commitment, periodic review by court or mental health administrative personnel of the defendant's condition and progress, and provisions for ultimately dropping charges if the defendant does not improve.[15] One source of this criticism is undoubtedly the empirical data available which tend to show that many defendants committed before trial are never tried, and that those defendants committed pursuant to ordinary civil proceedings are, on the average, released sooner than defendants automatically committed solely on account of their incapacity to stand trial.[16] Related to these statis-

[13] N. Y. Crim. Proc. Law § 730.50 (1971); see also Ill. Rev. Stat., c. 38, § 104–3 (c) (1971).

[14] Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U. Pa. L. Rev. 832 (1960); Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454–456, 471–472 (1967); N. Y. Report 91–107.

[15] Judicial Conference of the District of Columbia Circuit, Report of the Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial 49–52, 54–58, 133–146 (1965) (hereafter D. C. Report); N. Y. Report 73–124; Note, *supra*, 81 Harv. L. Rev., at 471–473.

[16] See Matthews, Mental Disability and the Criminal Law 138–140 (American Bar Foundation 1970); Morris, The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill

tics are substantial doubts about whether the rationale for pretrial commitment—that care or treatment will aid the accused in attaining competency—is empirically valid given the state of most of our mental institutions.[17] However, very few courts appear to have addressed the problem directly in the state context.

In *United States ex rel. Wolfersdorf* v. *Johnston*, 317 F. Supp. 66 (SDNY 1970), an 86-year-old defendant committed for nearly 20 years as incompetent to stand trial on state murder and kidnaping charges applied for federal habeas corpus. He had been found "not dangerous," and suitable for civil commitment. The District Court granted relief. It held that petitioner's incarceration in an institution for the criminally insane constituted cruel and unusual punishment, and that the "shocking circumstances" of his commitment violated the Due Process Clause. The court quoted approvingly the language of *Cook* v. *Ciccone*, 312 F. Supp., at 824, concerning the "substantial injustice in keeping an unconvicted person in . . . custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time."

In a 1970 case virtually indistinguishable from the one before us, the Illinois Supreme Court granted relief to an illiterate deaf mute who had been indicted for murder four years previously but found incompetent to stand trial on account of his inability to communicate, and committed. *People ex rel. Myers* v. *Briggs*, 46 Ill.

Criminals and Ex-Criminals by the Department of Correction of the State of New York, 17 Buffalo L. Rev. 651 (1968); McGarry & Bendt, Criminal vs. Civil Commitment of Psychotic Offenders: A Seven-Year Follow-Up, 125 Am. J. Psychiatry 1387, 1391 (1969); D. C. Report 50–52.

[17] Note, *supra*, 81 Harv. L. Rev., at 472–473; American Bar Foundation, The Mentally Disabled and the Law 415–418 (rev. ed. 1971) (hereafter ABF Study); N. Y. Report 72–77, 102–105, 186–190.

2d 281, 263 N. E. 2d 109 (1970). The institution where petitioner was confined had determined, "[I]t now appears that [petitioner] will never acquire the necessary communication skills needed to participate and cooperate in his trial." Petitioner, however, was found to be functioning at a "nearly normal level of performance in areas other than communication." The State contended petitioner should not be released until his competency was restored. The Illinois Supreme Court disagreed. It held:

> "This court is of the opinion that this defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released." *Id.*, at 288, 263 N. E. 2d, at 113.

C. *This Case.* Respondent relies heavily on *Greenwood* to support Jackson's commitment. That decision is distinguishable. It upheld only the initial commitment without considering directly its duration or the standards for release. It justified the commitment by treating it as if accomplished under allied statutory provisions relating directly to the individual's "insanity" and society's interest in his indefinite commitment, factors not considered in Jackson's case. And it sustained commitment only upon the finding of dangerousness. As Part A, *supra*, shows, all these elements subsequently have been held not simply sufficient, but necessary, to sustain a commitment like the one involved here.

The States have traditionally exercised broad power to commit persons found to be mentally ill.[18] The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among

[18] See generally ABF Study 34–59.

the States.[19] The particular fashion in which the power is exercised—for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity—reflects different combinations of distinct bases for commitment sought to be vindicated.[20] The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training.[21] Considering the number of persons affected,[22] it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.[23]

We need not address these broad questions here. It is clear that Jackson's commitment rests on proceedings that did not purport to bring into play, indeed did not even consider relevant, *any* of the articulated bases for

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[19] *Id.*, at 36–49. The ABF Study shows that in nine States the sole criterion for involuntary commitment is dangerousness to self or others; in 18 other States the patient's need for care or treatment was an alternative basis; the latter was the sole basis in six additional States; a few States had no statutory criteria at all, presumably leaving the determination to judicial discretion.

[20] See Note, Civil Restraint, Mental Illness, and the Right to Treatment, 77 Yale L. J. 87 (1967).

[21] See Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv. L. Rev. 1288, 1289–1297 (1966).

[22] In 1961, it was estimated that 90% of the approximately 800,000 patients in mental hospitals in this country had been involuntarily committed. Hearings on Constitutional Rights of the Mentally Ill before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pt. 1, pp. 11, 43 (1961). Although later U. S. Census Bureau data for 1969 show a resident patient population almost 50% lower, other data from the U. S. Department of Health, Education, and Welfare estimate annual admissions to institutions to be almost equal to the patient population at any one time, about 380,000 persons per annum. See ABF Study xv.

[23] Cf. *Powell* v. *Texas*, 392 U. S. 514 (1968); *Robinson* v. *California*, 370 U. S. 660 (1962).

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exercise of Indiana's power of indefinite commitment. The state statutes contain at least two alternative methods for invoking this power. But Jackson was not afforded any "formal commitment proceedings addressed to [his] ability to function in society," [24] or to society's interest in his restraint, or to the State's ability to aid him in attaining competency through custodial care or compulsory treatment, the ostensible purpose of the commitment. At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.[25] Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal. In light of differing state facilities and procedures and a lack of evidence in this record, we do not think it appropriate for us to attempt to prescribe arbitrary time limits. We note, however, that petitioner Jackson has now been confined for three and one-half years on a record that sufficiently establishes

[24] *In re Harmon*, 425 F. 2d 916, 918 (CA1 1970).

[25] In this case, of course, Jackson or the State may seek his commitment under either the general civil commitment statutes or under those for the commitment of the feebleminded.

the lack of a substantial probability that he will ever be able to participate fully in a trial.

These conclusions make it unnecessary for us to reach petitioner's Eighth-Fourteenth Amendment claim.

IV

Disposition of the Charges

Petitioner also urges that fundamental fairness requires that the charges against him now be dismissed. The thrust of his argument is that the record amply establishes his lack of criminal responsibility at the time the crimes are alleged to have been committed. The Indiana court did not discuss this question. Apparently it believed that by reason of Jackson's incompetency commitment the State was entitled to hold the charges pending indefinitely. On this record, Jackson's claim is a substantial one. For a number of reasons, however, we believe the issue is not sufficiently ripe for ultimate decision by us at this time.

A. Petitioner argues that he has already made out a complete insanity defense. Jackson's criminal responsibility at the time of the alleged offenses, however, is a distinct issue from his competency to stand trial. The competency hearing below was not directed to criminal responsibility, and evidence relevant to it was presented only incidentally.[26] Thus, in any event, we would have to remand for further consideration of Jackson's condition in the light of Indiana's law of criminal responsibility.

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[26] One doctor testified that Jackson "probably knows in a general way the basic differences between right and wrong." The other doctor agreed, but also testified that Jackson probably had no grasp whatsoever of abstract concepts such as time, "like simple things of yesterday and tomorrow."

B. Dismissal of charges against an incompetent accused has usually been thought to be justified on grounds not squarely presented here: particularly, the Sixth-Fourteenth Amendment right to a speedy trial,[27] or the denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence.[28] Jackson did not present the Sixth-Fourteenth Amendment issue to the state courts. Nor did the highest state court rule on the due process issue, if indeed it was presented to that court in precisely the above-described form. We think, in light of our holdings in Parts II and III, that the Indiana courts should have the first opportunity to determine these issues.

C. Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant's incompetency.[29] For instance, § 4.06 (3) of the Model Penal Code would permit an incompetent accused's attorney to contest any issue "susceptible of fair determination prior to trial and without the personal participation of the defendant." An alternative draft of § 4.06 (4) of the Model Penal Code would also permit an evidentiary hearing at which cer-

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[27] *People ex rel. Myers* v. *Briggs*, 46 Ill. 2d 281, 287–288, 263 N. E. 2d 109, 112–113 (1970); *United States ex rel. Wolfersdorf* v. *Johnston*, 317 F. Supp. 66, 68 (SDNY 1970); *United States* v. *Jackson*, 306 F. Supp. 4, 6 (ND Cal. 1969); see Foote, *supra*, n. 14, at 838–839; D. C. Report 145–146 (Recommendation No. 16).

[28] See cases cited in n. 27; N. Y. Report 119–121 (Recommendation No. 15); D. C. Report 52–53; Model Penal Code § 4.06 (2) (Proposed Official Draft 1962).

[29] *People ex rel. Myers* v. *Briggs*, *supra*, at 288, 263 N. E. 2d, at 113; *Neely* v. *Hogan*, 62 Misc. 2d 1056, 310 N. Y. S. 2d 63 (1970); N. Y. Report 115–123 (Recommendation No. 13); D. C. Report 143–144 (Recommendation No. 15); Foote, *supra*, n. 14, at 841–845; Model Penal Code § 4.06 (alternative subsections 3, 4) (Proposed Official Draft 1962); ABF Study 423.

tain defenses, not including lack of criminal responsibility, could be raised by defense counsel on the basis of which the court might quash the indictment. Some States have statutory provisions permitting pretrial motions to be made or even allowing the incompetent defendant a trial at which to establish his innocence, without permitting a conviction.[30] We do not read this Court's previous decisions[31] to preclude the States from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel. Of course, if the Indiana courts conclude that Jackson was almost certainly not capable of criminal responsibility when the offenses were committed, dismissal of the charges might be warranted. But even if this is not the case, Jackson may have other good defenses that could sustain dismissal or acquittal and that might now be asserted. We do not know if Indiana would approve procedures such as those mentioned here, but these possibilities will be open on remand.

Reversed and remanded.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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[30] Wis. Stat. Ann. § 971.14 (6) (1971); N. Y. Crim. Proc. Law § 730.60 (5) (1971); Mass. Gen. Laws, c. 123, § 17 (Supp. 1972); Mont. Rev. Code Ann. § 95-506 (c) (1969); Md. Ann. Code, Art. 59, § 24 (a) (1972). See *Reg.* v. *Roberts*, [1953] 3 W. L. R. 178, [1953] 2 All. E. R. 340 (Devlin, J.).

[31] See *Pate* v. *Robinson*, 383 U. S. 375 (1966); *Bishop* v. *United States*, 350 U. S. 961 (1956).

UNITED STATES ET AL. *v.* ALLEGHENY-LUDLUM STEEL CORP. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 71-227. Argued March 27, 1972—Decided June 7, 1972

1. Two "car service rules" promulgated by the Interstate Commerce Commission (ICC), requiring generally that unloaded freight cars be returned in the direction of the owning railroad, are "reasonable" under the Esch Car Service Act of 1917, in view of the ICC's finding, for which there is substantial record support, of a national freight car shortage, and its conclusion that the shortage could be alleviated by mandatory observance of the rules, which would give the railroads greater use of their cars and provide an incentive for the purchase of new equipment. Pp. 744–755.
2. The ICC proceeding in this case was governed by, and fully complied with, § 553 of the Administrative Procedure Act. Pp. 756–758.

325 F. Supp. 352, reversed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

Samuel Huntington argued the cause for the United States et al. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General McLaren, Acting Assistant Attorney General Comegys, Fritz R. Kahn, Betty Jo Christian,* and *James F. Tao.*

Max O. Truitt, Jr., and *William M. Moloney* argued the cause for appellees. With *Mr. Truitt* on the brief for appellees Allegheny-Ludlum Steel Corp. et al. was *Sally Katzen.* With *Mr. Moloney* on the brief for appellee Association of American Railroads were *James I. Collier, Jr.,* and *Gordon E. Neuenschwander. John F. Donelan* filed a brief for appellee National Industrial Traffic League.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In 1969 the Interstate Commerce Commission promulgated two "car service rules" that would have the

general effect of requiring that freight cars, after being unloaded, be returned in the direction of the lines of the road owning the cars. Several railroads and shippers instituted two separate suits under 28 U. S. C. §§ 2321–2325 to enjoin enforcement of these rules. In *Florida East Coast R. Co.* v. *United States,* 327 F. Supp. 1076 (MD Fla. 1971), the action of the Commission was sustained by a three-judge court, but in the case now before us a similar court for the Western District of Pennsylvania held the Commission's order invalid. 325 F. Supp. 352 (WD Pa. 1971). We noted probable jurisdiction, 404 U. S. 937, and for the reasons hereinafter stated we conclude that the Commission's action here challenged was within the scope of the authority conferred upon it by Congress and conformed to procedural requirements.

The country's railroads long ago abandoned the custom of shifting freight between the cars of connecting roads, and adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads. This practice necessarily required some arrangements for eventual return of a freight car to the lines of the road which owned it, and in 1902 the railroads through their trade association dealt with this and related problems in a code of car-service rules with which the roads agreed among themselves to comply. The effect of the Commission's order now under review is to promulgate two of these rules [1] as the Commission's own, with the result that sanctions attach to their violation by the railroads.

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[1] "Rule 1. Foreign cars, empty at a junction with the home road, must be:

"(a) Loaded at that junction to or via home rails, or,

"(b) Delivered empty at that junction to home road, except in

Because of critical freight-car shortages experienced during World War I, Congress enacted the Esch Car Service Act of 1917, which empowered the Commission to establish reasonable rules and practices with respect to car service by railroads. 40 Stat. 101, 49 U. S. C. § 1 (14)(a). The pertinent language of that Act provides:

> "The Commission may . . . establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter . . . ."

No party to this proceeding has questioned that the rules promulgated by the Commission are "rules, regulations, and practices with respect to car service," and therefore the issue before us is whether these rules are "reasonable" as that term is used in the Esch Act. The court below concluded, and the appellees here contend, that for a number of reasons the rules in question do not meet the statutory requirement of reasonableness. Appellees also contend that the findings of the Com-

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instances where Rule 6 has been invoked, or unless otherwise agreed by roads involved.

"Rule 2. Foreign empty cars other than those covered in Rule 1 shall be:

"(a) Loaded to or via owner's rails.

"(b) Loaded to a destination closer to owner's rails than is the loading station or delivered empty to a short line or switch loading road for such loading. (Car Selection Chart is designed to aid in so selecting cars for loading.)

"(c) Delivered empty to the home road at any junction subject to Rule 6.

"(d) Delivered empty to the road from which originally received under load, at the junction where received, *Except* that when handled in road haul service, cars of direct connection ownership may not be delivered empty to a road which does not have a direct connection with the car owner.

"(e) Returned empty to the delivering road when handled only in switching service." Jurisdictional Statement 64.

mission are insufficient under the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*

The record of proceedings before the Commission establishes that the Commission has been increasingly concerned with recurring shortages of freight cars available to serve the Nation's shippers. It found that shortages of varying duration and severity occur both as an annual phenomenon at peak loading periods and also during times of national emergency. The result of these shortages has been that roads were unable to promptly supply freight cars to shippers who had need of them.

Underlying these chronic shortages of available freight cars, the Commission found, was an inadequate supply of freight cars owned by the Nation's railroads. The Commission concluded that one of the principal factors causing this inadequate supply of freight cars was the operation of the national car-pool system. In practice this system resulted in freight cars being on lines other than those of the owning road for long periods of time, since the rules providing for the return of unloaded freight cars in the direction of the lines of the owning road were observed more often than not in the breach. Since the owning road was deprived of the use of its own freight cars for extended periods of time, the Commission found, there was very little incentive for it to acquire new freight cars. In addition, since a road which owned a supply of freight cars inadequate to serve its own on-line shippers could generally, by hook or by crook, arrange to utilize cars owned by other roads, the national car-pool system significantly reduced the normal incentive for a railroad to acquire sufficient equipment to serve its customers. The rules promulgated by the Commission are intended to make those railroads whose undersupply of freight cars contributes to the national shortage more directly feel the

pinch resulting from the shortage that they have helped to cause. By thus requiring each road to face up to any inadequacies in its ownership of freight cars, the rules are intended in the long run to correct the nationwide short supply of freight cars that the Commission has found to exist.

Central to the justification for the Commission's promulgation of these rules is its finding that there was a nationwide shortage of freight car ownership. The court below assumed the correctness of that finding, and we conclude that it was supported by substantial evidence.

Shortly after the Second World War, the Commission conducted an investigation into the adequacy of freight car supply and utilization by the Nation's railroads. The Commission in that proceeding concluded that there was "an inadequacy in freight car ownership by rail carriers as a group." Recognizing that this inadequacy was caused at least in part by the inability of the railroads to acquire new equipment, first during an era of wartime demand and then during an era of post-war boom, the Commission at that time imposed no obligation on the railroads except to require them to file with it their rules and regulations with respect to car service.

In 1963 the Commission began this investigation into the adequacy of car ownership, distribution, and utilization. At the conclusion of the investigatory phase of the proceeding in 1964, the Commission determined that there was a shortage of freight cars in general service. 323 I. C. C. 48 (1964). Formal notification of proposed rulemaking was then issued, and a questionnaire was submitted to the various railroads for the purpose of compiling data on car ownership and use. After these data were gathered, railroads, shippers, and other interested parties were permitted to file verified statements providing further factual material and to adduce

legal arguments. The Commission, through its Bureau of Operations, presented to the Hearing Examiner tabular collations of the freight car ownership and use data, and suggested a formula by which a railroad might compute the sufficiency of its freight car ownership. The Bureau also proposed that the entire Code of Car Service Rules adopted by the Association of American Railroads be promulgated by the Commission for mandatory observance.

Many railroads and shippers opposed mandatory enforcement of the rules. Some roads and shippers appeared in favor of at least some mandatory enforcement of the rules, arguing that unless some compulsion were used in enforcing them, cars purchased by a railroad for use by its shippers would continue to be detained for inordinately long periods of time by other roads.

After 50 days of hearings, the Trial Examiner issued his report, recommending against mandatory enforcement of the car-service rules. Although the Commission, prior to referring the matter to him, had previously made a definitive finding that a shortage of freight cars existed, the Examiner's report stated that there was no competent evidence in the record developed before him upon which such a determination could be made. The Examiner assigned several reasons for recommending against mandatory enforcement of the rules.

The Commission issued a comprehensive opinion disagreeing with the trial examiner in many respects, and ordering that two of the car-service rules be promulgated as rules of the Commission with sanctions attaching to noncompliance. Finding that "[t]he continuing relocation of cars on owner's lines is of major importance to the maintenance of an adequate car supply," [2] the Commis-

[2] 335 I. C. C. 264, 293 (1969).

sion concluded that the inconveniences feared by the shippers were outweighed by the long-term benefit that would accrue from the mandatory enforcement of the two car-service rules.

After its first order adopting the two rules was issued, the Commission considered claims that there was need for some procedure for exceptions to the mandatory enforcement of the rules. A supplemental order that established another rule that permitted the railroads to seek exception from the Commission's Bureau of Operations, in order to alleviate inequities and hardships.[3]

The court below held that the rules were not "reasonable," as that term is used in the Esch Act, for three reasons. First, although there was a general finding of a nationwide freight car shortage, the court said that a specific shortage on owner lines should have been found in order to justify the promulgation of these rules. Second, it said there should have been a finding as to the financial effects upon the railroads and shippers who would be affected by the rules. Finally, it supported its conclusion that the rules were not "reasonable" by the fact that even though violation of the rules could be enforced by monetary penalties, the Commission nonetheless conceded that obtaining complete compliance with them would be impossible.

The standard of judicial review for actions of the Interstate Commerce Commission in general, *Western Chemical Co.* v. *United States,* 271 U. S. 268 (1926),

[3] "Rule 19—Exceptions

"Exceptions to the rules (prescribed by the Interstate Commerce Commission for mandatory observance) for the purpose of further improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or alleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of Operations, Interstate Commerce Commission, Washington, D. C." Jurisdictional Statement 172.

and for actions taken by the Commission under the authority of the Esch Act in particular, *Assigned Car Cases,* 274 U. S. 564 (1927), is well established by prior decisions of this Court. We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported. In judicially reviewing these particular rules promulgated by the Commission, we must be alert to the differing standard governing review of the Commission's exercise of its rulemaking authority, on the one hand, and that governing its adjudicatory function, on the other:

> "In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general." *Assigned Car Cases, supra,* at 583.

The finding of the Commission as to a nationwide shortage of freight cars was based primarily on data submitted by the railroads themselves covering the years 1955 through 1964. Over this 10-year period total freight car ownership of Class I railroads dropped 12.4%, and aggregate carrying capacity of those railroads dropped 5%. Over the same period revenue tons orig-

inated dropped 2.9%. The decline in ownership of plain box cars, as opposed to more sophisticated types of cars, was even more dramatic; ownership of cars over the 10-year period in question dropped 22.1%, while aggregate carrying capacity of such cars dropped 18.9%. Testimony of witnesses for the National Industrial Traffic League, the Western Wood Products Association, the American Plywood Association, and the Vulcan Materials Association also supported the finding of a car shortage. These statistics, taken together with the Commission's post-war determination of a car shortage, portray a gradually worsening ratio of carrying capacity to revenue tons originated.

The Commission further found that freight car shortages, in the sense that a particular road was unable to promptly supply freight cars to particular shippers who needed them, have occurred chronically, both during peak loading seasons each year and during times of national emergency. It is quite true, as appellees suggest, that inability of the roads to supply cars to shippers at particular times is not conclusive evidence that there is a national shortage of freight car ownership. Conceivably, freight car ownership could be adequate, yet poor utilization of the supply could result in shortages. Nonetheless, the Commission may fairly rely on these chronic shortages in availability of freight cars as one factor upon which to base its conclusion that there was an overall shortage of ownership of freight cars.

The Commission also found that a surprisingly low percentage of freight cars was actually on the tracks of the roads owning the cars at any given time, and that this percentage had been decreasing during the period in question. In March 1966, less than 30% of the railroads' plain box cars were on the line of their owner, and during the preceding year that percentage

remained mostly in the low thirties. The Commission summarized the factual situation it found in these words:

> "From the evidence adduced and the data collected, it is obvious that an adequate freight car supply is as much a problem today as it was during the period considered in our last proceeding in 1947. Car service which involves a shortage of approximately one out of every ten cars ordered or even one out of every fifteen cars ordered demands that every available means be marshalled to eliminate such deficiencies." 335 I. C. C., at 285.

One of the means marshaled by the Commission to eliminate such deficiencies was the promulgation of the two rules under attack here. The thrust of these rules is to require that freight cars after unloading be dispatched in the direction of the lines of the owning road.

Thus, the Commission concluded after investigation that the railroads were frequently unable to supply shippers with freight cars. It reasoned from this fact, and from statistics showing a significantly more rapid decline in aggregate carrying capacity than in revenue tons originated, that an underlying and important cause of the unavailability of box cars to shippers was that the Nation's railroads simply did not jointly own a sufficient number of freight cars to adequately serve shippers of goods over their lines. Because of the existence of the national pool of freight cars, whereby roads may service on-line shippers with foreign cars, it was difficult, if not impossible, to relate inadequate ownership statistically to any particular road or roads. The Commission therefore chose to make mandatory two of the car-service rules that would have the effect of aligning more closely than at present the ownership of freight cars on the part of the road with the availability of those freight cars to the own-

ing road for use of its on-line shippers. The result of these rules, over the long term, the Commission reasoned, would be to bring home to those roads which themselves had an inadequate supply of cars to serve their on-line shippers that fact, and also without doubt to supply incentive to such roads to augment their supply of freight cars in order to adequately serve their on-line shippers. The national supply of freight cars would thereby be augmented, and the railroads as a result would be better able to supply the needs of shippers.

Appellees' fundamental substantive contention is that the short-term consequences of the enforcement of these rules will so seriously disrupt established industry practices as to outweigh any possible long-term benefits in service that might accrue from them, and that therefore the rules are not "reasonable" as that term is used in the Esch Act.[4] While, of course, conceding that the railroads themselves originally promulgated the rules for voluntary compliance, appellees argue that because the rules have been observed largely in the breach, usages and practices have grown up that permit far more efficient utilization of the existing fleet of freight cars than would be permitted if the two rules in question were enforced by the Commission. Appellees state that in reliance on the existence of a national pool of freight cars, and on the consequent availability to shippers of cars not owned by the line originating the shipment, manufacturing plants have been located and enlarged.

[4] Three separate briefs have been filed here in support of appellees, each of which understandably presents the case for affirmance in slightly differing form, and no one of which completely adopts the reasoning of the District Court. We have not found it necessary in deciding the case to deal with each separate argument in support of affirmance, since we believe all of them to be generally subsumed under those claims with which we deal.

They claim that enforcement of the rules now would seriously hamper the movement of freight traffic from these and other shipping points.

It may be conceded that the immediate effect of the Commission's order will be to disrupt some established practices with respect to the handling and routing of freight cars, and on occasion to cause serious inconvenience to shippers and railroads alike. If the Commission were thrusting these regulations upon an admittedly smoothly functioning transportation industry, well supplied with necessary rolling stock and adequately serving all shippers, the rationality of its action might well be open to question.

But such is not the case. The Commission's finding that there are recurring periods of significant length when there is not an adequate freight car supply to service shippers is supported by substantial evidence. While the flexible system of routing freight cars presently in existence may well have short-term advantages both for some shippers and some roads, the Commission could quite reasonably conclude that it has long-term drawbacks as well. The otherwise adverse effect on a road's ability to serve shippers that would result from its owning too few cars is cushioned; the beneficial effect on a road's ability to serve shippers that would result from its owning a sufficient supply of cars is dissipated. The Commission undoubtedly felt that rules designed only to most efficiently utilize the existing inadequate fleet of freight cars would have little or no effect on the nationwide shortage of such cars. Indeed, the appellees stress the concession by the Commission that these rules "are not designed to improve the utilization of freight cars, except insofar as return loading is compatible with the primary objective of increasing availability of cars to the owner." 335 I. C. C., at 294.

But only if we were to hold that Congress, in enact-

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ing the Esch Car Service Act, intended that the only criterion that the Commission might consider in establishing "reasonable rules, regulations, and practices with respect to car service" was the optimum utilization of an existing fleet of freight cars, however numerically inadequate that fleet might be, could this argument be sustained. Neither the language that Congress used nor the legislative history of the Act supports such a narrow reading of its grant of authority to the Commission. On the record before it, the Commission was justified in deciding that the railroads and the shippers were afflicted with an economic illness that might have to get worse before it got better. Existing practices respecting car service tended to destroy any incentive on the part of railroads to acquire new cars, and the resulting failure to acquire new equipment contributed to an overall nationwide shortage of freight cars that prevented the railroad industry from adequately serving shippers. Car-service rules that would tend to restore incentive to the various roads to augment their supply of freight cars, even at the temporary expense of optimum utilization of the existing fleet of freight cars, conform under these circumstances to the statutory requirement of reasonableness.

Appellees support their claim that the Commission's promulgation of these rules is not "reasonable" under the Esch Act on two grounds not directly related to the rules' claimed adverse effect on the ability of the roads to serve shippers. They attack the absence of a Commission finding as to the financial ability of roads inadequately supplied with freight cars to purchase new ones, and they cite the conceded impossibility of obtaining complete compliance with the rules as additional evidence of their unreasonableness.

The Commission's order does not require any road to purchase any freight cars. It abridges to some extent

the existing practice among railroads of treating the freight cars that they own as a pool, and for that reason may ultimately cause roads that do not have an adequate supply of freight cars to serve on-line shippers to be less able to serve such shippers than they are now. If, as a result of this fact, such roads are placed under economic and competitive pressure to acquire additional freight cars, there is certainly no principle of law we know of that would require the Commission to permit them to avoid this economic pressure by continuing to borrow freight cars acquired and owned by other lines.

The Commission, acceding to the arguments of shippers and railroads on rehearing, agreed that mandatory total compliance with the rules promulgated would be impossible in view of the tremendous number of units involved, and, accordingly a procedure by which exceptions might be applied for was established. How the provision for exceptions will be administered in practice is a matter about which we could only speculate at present. It is well established that an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. *Permian Basin Area Rate Cases,* 390 U. S. 747, 784–786 (1968). What bearing any of these factors might have on an action under the provisions of 49 U. S. C. § 1 (17) for the collection of penalties for a violation of the rules in question is a question best decided in such a proceeding. The fact that violation of a rule promulgated under the Esch Car Service Act may be the basis for a proceeding to collect a penalty does not either expand or contract the statutory definition of "reasonable" found in that Act.

What we have said thus far is enough to indicate our view that there is sufficient relationship between the

Commission's conclusions and the factual bases in the record upon which it relied to substantively support this exercise of its authority under the Esch Act. Appellees press on us an additional claim that the Commission failed to comply with the provisions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, citing *Burlington Truck Lines* v. *United States*, 371 U. S. 156 (1962), and *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954). *Burlington Truck Lines* is clearly inapposite, however, since in that case the Court was dealing with adjudication, not rulemaking. In criticizing the Commission's action there, the Court said that "the Administrative Procedure Act will not permit us to accept such adjudicatory practice," 371 U. S., at 167. In *Secretary of Agriculture* v. *United States, supra*, the Court reviewed the Commission's action, not under the Administrative Procedure Act, but on the basis of its prior cases establishing the standard for judicial review of agency action. Commenting that "[i]n dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions," the Court went on to conclude that the Commission "has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." 347 U. S., at 652–653. For the reasons previously stated, we find no such infirmities here.

This Court has held that the Administrative Procedure Act applies to proceedings before the Interstate Commerce Commission. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U. S. 173, 192 (1959). Appellees claim that the Commission's procedure here departed from the provisions of 5 U. S. C. §§ 556 and 557 of the Act. Those sections, however, govern a rulemaking proceeding only when 5 U. S. C. § 553 so requires. The latter section, dealing generally with rulemaking,

makes applicable the provisions of §§ 556 and 557 only "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing . . . ." The Esch Act, authorizing the Commission "after hearing, on a complaint or upon its own initiative without complaint, [to] establish reasonable rules, regulations, and practices with respect to car service . . . ," 49 U. S. C. § 1 (14)(a), does not require that such rules "be made on the record." 5 U. S. C. § 553. That distinction is determinative for this case. "A good deal of significance lies in the fact that some statutes do expressly require determinations on the record." 2 K. Davis, Administrative Law Treatise § 13.08, p. 225 (1958). Sections 556 and 557 need be applied "only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record.'" *Siegel* v. *Atomic Energy Comm'n,* 130 U. S. App. D. C. 307, 314, 400 F. 2d 778, 785 (1968); *Joseph E. Seagram & Sons Inc.* v. *Dillon,* 120 U. S. App. D. C. 112, 115 n. 9, 344 F. 2d 497, 500 n. 9 (1965). Cf. *First National Bank* v. *First Federal Savings & Loan Assn.,* 96 U. S. App. D. C. 194, 225 F. 2d 33 (1955). We do not suggest that only the precise words "on the record" in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings, but we do hold that the language of the Esch Car Service Act is insufficient to invoke these sections.

Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings as in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), and *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292 (1937), and because 49 U. S. C. § 1 (14)(a) does not require a determination "on the record," the provisions of 5 U. S. C. §§ 556 and 557 were inapplicable.

This proceeding, therefore, was governed by the provisions of 5 U. S. C. § 553 of the Administrative Procedure Act, requiring basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.[5] The "Findings" and "Conclusions" embodied in the Commission's report fully comply with these requirements, and nothing more was required by the Administrative Procedure Act.

We conclude that the Commission's action in promulgating these rules was substantively authorized by the Esch Act and procedurally acceptable under the Administrative Procedure Act. The judgment of the District Court must therefore be

Reversed.

[5] 49 U. S. C. § 1 (14) (a) likewise requires the Commission to conduct a hearing before promulgating rules.

Syllabus

FIRST NATIONAL CITY BANK *v.* BANCO NACIONAL DE CUBA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 70–295. Argued February 22, 1972—Decided June 7, 1972

This case involves a claim by respondent for excess collateral it had pledged with petitioner to secure a loan, and a counterclaim by petitioner for that excess as an offset against the value of petitioner's property in Cuba expropriated by Cuba without compensation. The District Court recognized that this Court's decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, holding that generally the courts of one nation will not sit in judgment on the acts of another nation within the latter's territory (act of state doctrine) would bar assertion of the counterclaim but concluded that post-*Sabbatino* congressional enactments had in effect overruled that decision. The court issued summary judgment for petitioner on all issues except the amount available for possible setoff. The Court of Appeals reversed, holding that *Sabbatino* barred assertion of the counterclaim. *Held:* The judgment is reversed. Pp. 762–776.

MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and MR. JUSTICE WHITE, concluded that since the Executive Branch, which is charged with the primary responsibility for the conduct of foreign affairs, has (contrary to the position it took in *Sabbatino*) expressly represented to the Court that the application of the act of state doctrine in this case would not advance the interests of American foreign policy, the decision in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 210 F. 2d 375, should be adopted and approved, thus permitting judicial examination of the legal issues raised by the act of a foreign sovereign within its own territory. Pp. 762–770.

MR. JUSTICE DOUGLAS concluded that the central issue in this case is governed by *National City Bank* v. *Republic of China*, 348 U. S. 356 (holding that a sovereign's claim may be offset by a counterclaim or setoff), rather than by the *Bernstein* exception to *Sabbatino*, and accordingly would allow the setoff up to the amount of respondent's claim. Pp. 770–773.

MR. JUSTICE POWELL, believing that *Sabbatino*'s broad holding was not compelled by the principles underlying the act of

state doctrine, concluded that federal courts have an obligation to hear cases such as this one and to apply applicable international law. Pp. 773–776.

442 F. 2d 530, reversed and remanded.

REHNQUIST, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and WHITE, J., joined. DOUGLAS, J., filed an opinion concurring in the result, *post*, p. 770. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 773. BRENNAN, J., filed a dissenting opinion in which STEWART, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 776.

Henry Harfield argued the cause and filed briefs for petitioner.

Victor Rabinowitz argued the cause for respondent. With him on the brief was *Leonard B. Boudin*.

Solicitor General Griswold filed a memorandum for the United States as *amicus curiae* urging reversal.

MR. JUSTICE REHNQUIST announced the judgment of the Court, and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE WHITE join.

In July 1958, petitioner loaned the sum of $15 million to a predecessor of respondent. The loan was secured by a pledge of United States Government bonds. The loan was renewed the following year, and in 1960 $5 million was repaid, the $10 million balance was renewed for one year, and collateral equal to the value of the portion repaid was released by petitioner.

Meanwhile, on January 1, 1959, the Castro government came to power in Cuba. On September 16, 1960, the Cuban militia, allegedly pursuant to decrees of the Castro government, seized all of the branches of petitioner located in Cuba. A week later the bank retaliated by selling the collateral securing the loan, and applying the proceeds of the sale to repayment of the principal and unpaid interest. Petitioner concedes

that an excess of at least $1.8 million over and above principal and unpaid interest was realized from the sale of the collateral. Respondent sued petitioner in the Federal District Court to recover this excess, and petitioner, by way of setoff and counterclaim, asserted the right to recover damages as a result of the expropriation of its property in Cuba.

The District Court recognized that our decision in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964), holding that generally the courts of one nation will not sit in judgment on the acts of another nation within its own territory would bar the assertion of the counterclaim, but it further held that congressional enactments since the decision in *Sabbatino* had "for all practical purposes" overruled that case. Following summary judgment in favor of the petitioner in the District Court on all issues except the amount by which the proceeds of the sale of collateral exceeded the amount that could properly be applied to the loan by petitioner, the parties stipulated that in any event this difference was less than the damages that petitioner could prove in support of its expropriation claim if that claim were allowed. Petitioner then waived any recovery on its counterclaim over and above the amount recoverable by respondent on its complaint, and the District Court then rendered judgment dismissing respondent's complaint on the merits.

On appeal, the Court of Appeals for the Second Circuit held that the congressional enactments relied upon by the District Court did not govern this case, and that our decision in *Sabbatino* barred the assertion of petitioner's counterclaim. We granted certiorari and vacated the judgment of the Court of Appeals for consideration of the views of the Department of State which had been furnished to us following the filing of the petition for certiorari. 400 U. S. 1019 (1971).

Upon reconsideration, the Court of Appeals by a divided vote adhered to its earlier decision. We again granted certiorari. 404 U. S. 820 (1971).

We must here decide whether, in view of the substantial difference between the position taken in this case by the Executive Branch and that which it took in *Sabbatino*, the act of state doctrine prevents petitioner from litigating its counterclaim on the merits. We hold that it does not.

The separate lines of cases enunciating both the act of state and sovereign immunity doctrines have a common source in the case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 146 (1812). There Chief Justice Marshall stated the general principle of sovereign immunity: sovereigns are not presumed without explicit declaration to have opened their tribunals to suits against other sovereigns. Yet the policy considerations at the root of this fundamental principle are in large part also the underpinnings of the act of state doctrine. The Chief Justice observed:

> "The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that *the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign*, that the questions to which such wrongs give birth are rather *questions of policy than of law*, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention." (Emphasis added.)

Thus, both the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government. The history and

the legal basis of the act of state doctrine are treated comprehensively in the Court's opinion in *Sabbatino, supra.* The Court there cited Chief Justice Fuller's "classic American statement" of the doctrine, found in *Underhill* v. *Hernandez,* 168 U. S. 250, 252 (1897):

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law including international law. *The Paquete Habana,* 175 U. S. 677 (1900). The doctrine precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State. It is clear, however, from both history and the opinions of this Court that the doctrine is not an inflexible one. Specifically, the Court in *Sabbatino* described the act of state doctrine as "a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution," 376 U. S., at 427, and then continued:

> "[I]ts continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Id.,* at 427–428.

In *Sabbatino*, the Executive Branch of this Government, speaking through the Department of State, advised attorneys for *amici* in a vein which the Court described as being "intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation." *Id.*, at 420. The United States argued before this Court in *Sabbatino* that the Court should not "hold, for the first time, that executive silence regarding the act of state doctrine is equivalent to executive approval of judicial inquiry into the foreign act."

In the case now before us, the Executive Branch has taken a quite different position. The Legal Adviser of the Department of State advised this Court on November 17, 1970, that as a matter of principle where the Executive publicly advises the Court that the act of state doctrine need not be applied, the Court should proceed to examine the legal issues raised by the act of a foreign sovereign within its own territory as it would any other legal question before it. His letter refers to the decision of the court below in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (CA2 1954), as representing a judicial recognition of such a principle, and suggests that the applicability of the principle was not limited to the *Bernstein* case. The Legal Adviser's letter then goes on to state:

> "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

The question that we must now decide is whether the so-called *Bernstein* exception to the act of state doctrine should be recognized in the context of the facts before the Court. In *Sabbatino*, the Court said:

> "This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now." 376 U. S., at 420.

The act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots, not in the Constitution, but in the notion of comity between independent sovereigns. *Sabbatino, supra,* at 438; *National City Bank* v. *Republic of China,* 348 U. S. 356 (1955); *The Schooner Exchange* v. *M'Faddon,* 7 Cranch 116 (1812).[1] It is also buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent on the making of treaties. The issues presented by its invocation are therefore quite dissimilar to those raised in *Zschernig* v. *Miller,* 389 U. S. 429 (1968), where the Court struck down an Oregon statute that was held to be "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Id.,* at 432.

The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government. The Court's opinion in *Underhill* v. *Hernandez,* 168 U. S. 250 (1897), stressed the fact that the revolutionary government of Venezuela had been recognized by the United States.

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[1] In the latter case, speaking of sovereign immunity, Chief Justice Marshall said:

"It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

"Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise." 7 Cranch, at 145–146.

In *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918), the Court was explicit:

> "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. . . . It has been specifically decided that 'Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. . . .' "

United States v. *Belmont*, 301 U. S. 324 (1937), is another case that emphasized the exclusive competence of the Executive Branch in the field of foreign affairs.[2] A year earlier, the Court in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319 (1936), had quoted with approval the statement of John Marshall when he was a member of the House of Representatives dealing with this same subject:

> " 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' "

The opinion of Scrutton, L. J., in *Luther* v. *James Sagor & Co.*, [1921] 3 K. B. 532, described in *Sabbatino* as a "classic case" articulating the act of state doctrine "in terms not unlike those of the United States cases," strongly suggests that under the English doctrine the

[2] "Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government." 301 U. S., at 330.

Executive by representation to the courts may waive the application of the doctrine:

> "But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized. . . . The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges." *Id.*, at 559.

We think that the examination of the foregoing cases indicates that this Court has recognized the primacy of the Executive in the conduct of foreign relations quite as emphatically as it has recognized the act of state doctrine. The Court in *Sabbatino* throughout its opinion emphasized the lead role of the Executive in foreign policy, particularly in seeking redress for American nationals who had been the victims of foreign expropriation, and concluded that any exception to the act of state doctrine based on a mere silence or neutrality on the part of the Executive might well lead to a conflict between the Executive and Judicial Branches. Here, however, the Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy.

The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches

of the government. We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine. We believe this to be no more than an application of the classical common-law maxim that "[t]he reason of the law ceasing, the law itself also ceases" (Black's Law Dictionary 288 (4th ed. 1951)).

Our holding is in no sense an abdication of the judicial function to the Executive Branch. The judicial power of the United States extends to this case, and the jurisdictional standards established by Congress for adjudication by the federal courts have been met by the parties. The only reason for not deciding the case by use of otherwise applicable legal principles would be the fear that legal interpretation by the judiciary of the act of a foreign sovereign within its own territory might frustrate the conduct of this country's foreign relations. But the branch of the government responsible for the conduct of those foreign relations has advised us that such a consequence need not be feared in this case. The judiciary is therefore free to decide the case without the limitations that would otherwise be imposed upon it by the judicially created act of state doctrine.

It bears noting that the result we reach is consonant with the principles of equity set forth by the Court in *National City Bank* v. *Republic of China*, 348 U. S. 356 (1955). Here respondent, claimed by petitioner to be an instrument of the government of Cuba, has sought to come into our courts and secure an adjudication in its favor, without submitting to decision on the merits of the counterclaim which petitioner asserts against

it. Speaking of a closely analogous situation in *Republic of China, supra,* the Court said:

> "We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in *The Schooner Exchange* are applicable here to foreclose a court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in *The Schooner Exchange,* the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Id.,* at 361–362.

The act of state doctrine, as reflected in the cases culminating in *Sabbatino,* is a judicially accepted limitation on the normal adjudicative processes of the courts, springing from the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy. It would be wholly illogical to insist that such a rule, fashioned because of fear that adjudication would interfere with the conduct of foreign relations, be applied in the face of an assurance from that branch of the Federal Government that conducts foreign relations that such a result would not

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obtain. Our holding confines the courts to adjudication of the case before them, and leaves to the Executive Branch the conduct of foreign relations. In so doing, it is both faithful to the principle of separation of powers and consistent with earlier cases applying the act of state doctrine where we lacked the sort of representation from the Executive Branch that we have in this case.

We therefore reverse the judgment of the Court of Appeals, and remand the case to it for consideration of respondent's alternative bases of attack on the judgment of the District Court.

Reversed and remanded.

MR. JUSTICE DOUGLAS, concurring in the result.

Banco Nacional de Cuba v. *Sabbatino*, 376 U. S. 398, does not control the central issue in the present case. Rather, it is governed by *National City Bank* v. *Republic of China*, 348 U. S. 356.

I start from the premise that the defendant (petitioner) in the present litigation is properly in the District Court. Respondent, who brought this suit, is for our purposes the sovereign state of Cuba; and, apart from cases where another nation is at war with the United States, it is settled that sovereign states are allowed to sue in the courts of the United States. See *Banco Nacional de Cuba* v. *Sabbatino*, *supra*, at 408–410.

Cuba sues here to recover the difference between a loan made by petitioner and the proceeds of a sale of the collateral securing the loan. The excess is allegedly about $1.8 million. Petitioner sought to set off against that amount claims arising out of the confiscation of petitioner's Cuban properties. How much those setoffs would be, we do not know. The District Court ruled that the amount of these setoffs "cannot be determined on these motions," 270 F. Supp. 1004, 1011, saying that they represented "triable issues of fact and law." *Ibid.*

I would reverse the Court of Appeals and affirm the District Court, remanding the case for trial on the amount of the setoff and I would allow the setoff up to the amount of respondent's claim.

It was ruled in the *Republic of China* case that a sovereign's claim may be cut down by a counterclaim or setoff. 348 U. S., at 364. The setoff need not be "based on the subject matter" of the claim asserted in the strict sense. The test is "the consideration of fair dealing." *Id.*, at 365. The Court said:

> "The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which nongovernmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in *The Schooner Exchange* [7 Cranch 116] are applicable here to foreclose a court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in *The Schooner Exchange,* the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Id.*, at 361–362.

It would offend the sensibilities of nations if one country, not at war with us, had our courthouse door closed to it. It would also offend our sensibilities if Cuba could collect the amount owed on liquidation of the collateral for the loan and not be required to account for any setoff. To allow recovery without more would permit Cuba to have its cake and eat it too. Fair dealing requires allowance of the setoff to the amount of the claim on which this suit is brought—a precept that should satisfy any so-called rational decision.

If the amount of the setoff exceeds the asserted claim, then we would have a *Sabbatino* type of case. There the fund in controversy was the proceeds of sugar which Cuba had nationalized. *Sabbatino* held that the issue of who was the rightful claimant was a "political question," as its resolution would result in ideological and political clashes between nations which must be resolved by the other branches of government.[1] We would have that type of controversy here if, and to the extent that, the setoff asserted exceeds the amount of Cuba's claim. I would disallow the judicial resolution of that dispute for the reasons stated in *Sabbatino* and by MR. JUSTICE BRENNAN in the instant case. As he states, the Executive Branch "cannot by simple stipulation change a political question into a cognizable claim." But I would allow the setoff to the extent of the claim asserted by Cuba because Cuba is the one who asks our judicial aid in collecting its debt from petitioner and, as the *Republic of China* case says, "fair dealing" requires recognition of any counterclaim or setoff that eliminates or reduces that claim.[2] It is

[1] A historic instance of the resolution of such a conflict ultimately enforced by judicial sanctions is *United States* v. *Pink*, 315 U. S. 203.

[2] Cf. *Pons* v. *Republic of Cuba*, 111 U. S. App. D. C. 141, 294 F. 2d 925.

that principle, not the *Bernstein*[3] exception, which should govern here. Otherwise, the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'.[4]

MR. JUSTICE POWELL, concurring in the judgment.

Although I concur in the judgment of reversal and remand, my reasons differ from those expressed by MR. JUSTICE REHNQUIST and MR. JUSTICE DOUGLAS. While *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 419–420 (1964), technically reserves the question of the validity of the *Bernstein* exception (*Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (CA2 1954), as MR. JUSTICE BRENNAN notes in his dissenting opinion, the reasoning of *Sabbatino* implicitly rejects that exception. Moreover, I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.

Nor do I find *National City Bank* v. *Republic of China*, 348 U. S. 356 (1955), to be dispositive. The Court there dealt with the question of jurisdiction over the parties to hear a counterclaim asserted against a foreign state seeking redress in our courts. Jurisdiction does not necessarily imply that a court may hear a counterclaim which would otherwise be nonjusticiable. Jurisdiction and justiciability are, in other words, dif-

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[3] *Bernstein* v. *N. V. Nederlandsche-Amerikaansche*, 210 F. 2d 375.

[4] "The history of the doctrine indicates that its function is not to effect unquestioning judicial deference to the Executive, but to achieve a result under which diplomatic rather than judicial channels are used in the disposition of controversies between sovereigns." Delson, The Act of State Doctrine—Judicial Deference or Abstention? 66 Am. J. Int'l L. 83, 84 (1972).

ferent concepts. One concerns the court's power over the parties; the other concerns the appropriateness of the subject matter for judicial resolution. Although attracted by the justness of the result he reaches, I find little support for MR. JUSTICE DOUGLAS' theory that the counterclaim is justiciable up to, but no further than, the point of setoff.

I nevertheless concur in the judgment of the Court because I believe that the broad holding of *Sabbatino* [1] was not compelled by the principles, as expressed therein, which underlie the act of state doctrine. As Mr. Justice Harlan stated in *Sabbatino*, the act of state doctrine is not dictated either by "international law [or] the Constitution," but is based on a judgment as to "the proper distribution of functions between the judicial and the political branches of the Government on matters bearing upon foreign affairs." 376 U. S., at 427–428. Moreover, as noted in *Sabbatino*, there was no intention of "laying down or reaffirming an inflexible and all-encompassing rule . . . ." *Id.*, at 428.

I do not disagree with these principles, only with the broad way in which *Sabbatino* applied them. Had I been a member of the *Sabbatino* Court, I probably would have joined the dissenting opinion of MR. JUSTICE WHITE. The balancing of interests, recognized as appropriate by *Sabbatino*, requires a careful examination of the facts in each case and of the position, if any, taken by the political branches of government. I do not agree, however, that balancing the functions of the

[1] The holding was "that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U. S., at 428.

judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons who seek to resolve their grievances by the judicial process.

Nor do I think the doctrine of separation of powers dictates such an abdication. To so argue is to assume that there is no such thing as international law but only international political disputes that can be resolved only by the exercise of power. Admittedly, international legal disputes are not as separable from politics as are domestic legal disputes, but I am not prepared to say that international law may never be determined and applied by the judiciary where there has been an "act of state." [2] Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long-neglected area if the resolution of all disputes involving an "act of state" is relegated to political rather than judicial processes.

Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts

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[2] MR. JUSTICE WHITE's dissenting opinion in *Sabbatino*, citing cases from England, the Netherlands, Germany, Japan, Italy, and France, states:

"No other civilized country has found such a rigid rule [as that announced in *Sabbatino*] necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law." 376 U. S., at 440 (footnote omitted).

have an obligation to hear cases such as this. This view is not inconsistent with the basic notion of the act of state doctrine which requires a balancing of the roles of the judiciary and the political branches. When it is shown that a conflict in those roles exists, I believe that the judiciary should defer because, as the Court suggested in *Sabbatino,* the resolution of one dispute by the judiciary may be outweighed by the potential resolution of multiple disputes by the political branches.

In this case where no such conflict has been shown, I think the courts have a duty to determine and apply the applicable international law. I therefore join in the Court's decision to remand the case for further proceedings.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

The Court today reverses the judgment of the Court of Appeals for the Second Circuit which declined to engraft the so-called *"Bernstein"* exception upon the act of state doctrine as expounded in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398 (1964).[1] The Court,

[1] "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, . . . is found in *Underhill* v. *Hernandez,* 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

" 'Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.' " *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 416 (1964).

The so-called *"Bernstein"* exception to this principle derives from *Bernstein* v. *N. V. Nederlandsche-Amerikaansche,* 210 F. 2d 375

nevertheless, affirms the Court of Appeals' rejection of the *"Bernstein"* exception. Four of us in this opinion unequivocally take that step, as do MR. JUSTICE DOUGLAS and MR. JUSTICE POWELL in their separate opinions concurring in the result or judgment.

The anomalous remand for further proceedings results because three colleagues, MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and MR. JUSTICE WHITE, adopt the contrary position, while MR. JUSTICE DOUGLAS finds *National City Bank* v. *Republic of China,* 348 U. S. 356 (1955), dispositive in the circumstances of this case and MR. JUSTICE POWELL rejects the specific holding in *Sabbatino,* believing it was not required by the principles underlying the act of state doctrine.

MR. JUSTICE REHNQUIST'S opinion reasons that the act of state doctrine exists primarily, and perhaps even solely, as a judicial aid to the Executive to avoid embarrassment to the political branch in the conduct of foreign rela-

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(1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his property by Nazi Germany in view of a letter from the Acting Legal Adviser of the Department of State to the effect:

" 'The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.' " *Id.,* at 376.

The *"Bernstein"* exception has been successfully applied only once. As the Court of Appeals noted in this case, 442 F. 2d 530, 535 (1971):

"[T]he *Bernstein* exception has been an exceedingly narrow one. Prior to the present case, a 'Bernstein letter' has been issued only once—in the *Bernstein* case itself. Moreover, the case has never been followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed."

tions. Where the Executive expressly indicates that invocation of the rule will not promote domestic foreign policy interests, his opinion states the view, adopting the *"Bernstein"* exception, that the doctrine does not apply. This syllogism—from premise to conclusion—is, with all respect, mechanical and fallacious. Moreover, it would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in the politics of international relations to the damage not only of the courts and the Executive but of the rule of law.

MR. JUSTICE REHNQUIST'S opinion also finds support for its result in *National City Bank*, and MR. JUSTICE DOUGLAS would remand on the authority of that case alone. In his view, "[f]air dealing" requires that a foreign sovereign suing in our courts be subject to setoffs, even though counterclaims are barred by the act of state doctrine for amounts exceeding the state's claim. I believe that *National City Bank* is not at all in point, and that my Brother DOUGLAS' view leads to the strange result that application of the act of state doctrine depends upon the dollar value of a litigant's counterclaim.

Finally, MR. JUSTICE POWELL acknowledges that *Sabbatino*, not *National City Bank*, controls this case, but, nonetheless, votes to remand on the ground that *Sabbatino* was wrongly decided. In my view, nothing has intervened in the eight years since that decision to put its authority into question.

I

On September 16 and 17, 1960, the Government of Cuba nationalized the branch offices of petitioner in Cuba. Petitioner promptly responded by selling collateral that had previously been pledged in security for a loan it had made to a Cuban instrumentality. Respondent—

alleged by petitioner to be an agent of the Cuban Government [2]—in turn, instituted this action to recover the excess of the proceeds of the sale over the accrued interest and principal of the loan.[3] Petitioner then counterclaimed for the value of its Cuban properties, alleging that they had been expropriated in violation of international law.[4] On cross-motions for summary judgment,

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[2] The District Court, on cross-motions for summary judgment, found respondent to be "one and the same" as the Government of Cuba. 270 F. Supp. 1004, 1006 (1967). Respondent argues that its relationship with Cuba was a disputed issue of fact that could not properly be resolved before trial. This issue, not decided by the Court of Appeals, see 431 F. 2d 394, 397 (1970), is necessarily open for consideration on remand.

[3] The complaint also pleaded a second cause of action that is not material to the issues before us.

[4] Petitioner actually asserts two counterclaims—first, that the Cuban expropriation was invalid, giving rise to damages, and, second, that Cuba became indebted to petitioner, regardless of the validity of the expropriation decree. Moreover, petitioner invokes Cuban and United States as well as international law in support of both claims. These refinements are of no avail to petitioner. If applicable, the act of state doctrine, of course, bars consideration of both international law claims; although the Court in *Sabbatino* stated its holding in terms that "the Judicial Branch will not examine the *validity* of a taking of property within its own territory by a foreign sovereign government . . . ," 376 U. S., at 428 (emphasis added), the holding clearly embraced judicial review not only of the taking but of the obligation to make "prompt, adequate, and effective compensation." *Id.*, at 429. See also *id.*, at 433.

Similarly, petitioner's allegations do not state cognizable claims under Cuban law. *Sabbatino* affirmed that United States courts will not sit in judgment on the validity of a foreign act of state under foreign law, for such an inquiry "would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question." *Id.*, at 415 n. 17. The same rationale applies to petitioner's assertion that it is entitled to compensation under Cuban law. Although foreign causes of action may, of course, be entertained in appropriate circumstances in our courts, the claim in issue presents the same dangers as the claim of invalidity of the expropriation under Cuban law. In any

the District Court held that petitioner "is entitled to set-off as against [respondent's] claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of [its] Cuban properties." 270 F. Supp. 1004, 1011 (1967). The Court of Appeals for the Second Circuit reversed on the ground that the act of state doctrine, as applied in *Sabbatino*, forecloses judicial review of the nationalization of petitioner's branch offices. 431 F. 2d 394 (1970).[5]

While a petition to this Court was pending for a writ of certiorari, the Legal Adviser of the Department of State advised us that the act of state doctrine should

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event, as the Court indicated in *Sabbatino, ibid.*, if Cuban law governs, the test to be applied is the success petitioner's claims would receive in Cuba itself. It cannot seriously be contended that Cuban courts would hold the nationalization of petitioner's properties invalid or Cuba liable to petitioner for meaningful compensation. Indeed, although Art. 24 of the Fundamental Law of Cuba provides for compensation for certain public takings, Cuban Law No. 851, pursuant to which petitioner's properties were nationalized, itself declares in Art. 6 that "[t]he resolutions . . . in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available there against." Moreover, the promise of compensation provided under Law No. 851 may, as the Court said in *Sabbatino, id.*, at 402, "well be deemed illusory."

Finally, United States law becomes relevant only if the public-policy-of-the-forum exception to the *lex loci* conflict-of-laws rule is recognized—that is, if the American forum is free, because of its public policy, to deny recognition to Cuban law otherwise applicable as the law of the situs of the property seized. But the very purpose of the act of state doctrine is to forbid application of that exception. See generally, *e. g.*, Henkin, Act of State Today: Recollections in Tranquility, 6 Colum. J. of Transnat'l L. 175 (1967). See also *Sabbatino, supra*, at 438.

[5] In arriving at this conclusion, the court found inapplicable the Hickenlooper Amendment to the Foreign Assistance Act of 1961, 78 Stat. 1013, as amended, 22 U. S. C. § 2370 (e)(2). I agree with my colleagues in leaving that determination undisturbed.

not be applied to bar consideration of counterclaims in the circumstances of this case. More particularly, the Legal Adviser stated: [6]

> "Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.
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> . . . . . .
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> "In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state—expropriation of defendant's Cuban property—occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, moreover, that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.
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> "The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

We granted certiorari, vacated the judgment of the Court of Appeals, and, without expressing any views on the

[6] The text of the Legal Adviser's views appears in full in 442 F. 2d, at 536–538.

merits of the case, remanded for reconsideration in light of this statement of position by the Department of State. 400 U. S. 1019 (1971). On remand the Court of Appeals adhered to its original decision, 442 F. 2d 530 (1971), and we again granted certiorari, 404 U. S. 820 (1971).

II

The opinion of MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and MR. JUSTICE WHITE, states that "[t]he only reason for not deciding the case by use of otherwise applicable legal principles would be the fear that legal interpretation by the judiciary of the act of a foreign sovereign within its own territory might frustrate the conduct of this country's foreign relations." Even if this were a correct description of the rationale for the act of state doctrine, the conclusion that the reason for the rule ceases when the Executive, as here, requests that the doctrine not be applied plainly does not follow. In *Sabbatino* this Court reviewed at length the risks of judicial review of a foreign expropriation in terms of the possible prejudice to the conduct of our external affairs. The Court there explained, 376 U. S., at 432–433:

> "If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law, would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.
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> "Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well

> after the taking, when such an impact would be contrary to our national interest. Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. . . . In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided."

This reasoning may not apply where the Executive expressly stipulates that domestic foreign policy interests will not be impaired however the court decides the validity of the foreign expropriation. But by definition those cases can only arise where the political branch is indifferent to the result reached, and that surely is not the case before us. The United States has protested the nationalization by Cuba of property belonging to American citizens as a violation of international law. The United States has also severed diplomatic relations with that government. The very terms of the Legal Adviser's communication to this Court, moreover, anticipate a favorable ruling that the Cuban expropriation of petitioner's properties was invalid.[7]

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[7] The Legal Adviser states:

"Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied [in cases of this kind] . . . .

"The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff[s], for the purpose of recovering deposits or sums owed them in the United States without taking into account the institutions' counterclaims for their assets expropriated in the foreign country."

The implication is clear that the Legal Adviser believes that such

Sabbatino itself explained why in these circumstances the representations of the Executive in favor of removing the act of state bar cannot be followed: "It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries." *Id.*, at 436. Should the Court of Appeals on remand uphold the Cuban expropriation in this case, the Government would not only be embarrassed but would find its extensive efforts to secure the property of United States citizens abroad seriously compromised.[8]

Nor can it be argued that this risk is insubstantial because the substantive law controlling petitioner's claims is clear. The Court in *Sabbatino* observed that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Id.*,

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corporations are entitled to offsetting redress for the value of their nationalized property. Note, 12 Harv. Int'l L. J. 557, 576–577 (1971). It is also significant that the Government in the past has acknowledged "that a *'Bernstein* letter,' should one be issued in special circumstances where it might be appropriate, plainly does not seek to decide the case in question, but merely removes the act of state bar to judicial consideration of the foreign act." Brief for the United States as *Amicus Curiae*, in *Banco Nacional de Cuba* v. *Sabbatino*, No. 16, O. T. 1963, p. 38. The Government makes no such representation in this case. Note, 12 Harv. Int'l L. J., at 571 and n. 74. To the contrary, the Government now argues: "By disregarding [the] statement of Executive policy involving foreign investment by American firms, the court below has seriously restricted the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad." Memorandum for the United States as *Amicus Curiae* 3.

[8] See *Sabbatino*, 376 U. S., at 432: "Relations with third countries which have engaged in similar expropriations would not be immune from effect."

at 428.[9] And this observation, if anything, has more force in this case than in *Sabbatino*, since respondent argues with some substance that the Cuban nationalization of petitioner's properties, unlike the expropriation at issue in *Sabbatino*, was not discriminatory against United States citizens.

Thus, the assumption that the Legal Adviser's letter removes the possibility of interference with the Executive in the conduct of foreign affairs is plainly mistaken.

III

That, however, is not the crux of my disagreement with my colleagues who would uphold the *"Bernstein"* exception. My Brother REHNQUIST's opinion asserts that the act of state doctrine is designed primarily, and perhaps even entirely, to avoid embarrassment to the political branch. Even a cursory reading of *Sabbatino*, this Court's most recent and most exhaustive treatment of the act of state doctrine, belies this contention. Writing for a majority of eight in *Sabbatino*, Mr. Justice Harlan laid bare the foundations of the doctrine as follows, *id.*, at 427–428:

> "If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a

[9] It bears repeating here what the Court said in a footnote to this statement, *id.*, at 429 n. 26: "We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals." See n. 14, *infra*.

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particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case [see n. 1, *supra*], for the political interest of this country may, as a result, be measurably altered."

Applying these principles to the expropriation before the Court, Mr. Justice Harlan noted the lack of consensus among the nations of the world on the power of a state to take alien property, and stated further that "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.*, at 430. He reviewed as well the possible adverse effects from judicial review of foreign expropriations on the conduct of our external affairs, discussed above, and emphasized the powers of the Executive "to ensure fair treatment of United States nationals," *id.*, at 435, in comparison to the "[p]iecemeal dispositions," *id.*, at 432, that courts could make:

"Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that

> United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country." *Id.*, at 431.
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> "When one considers the variety of means possessed by this country to make secure foreign investment, the persuasive or coercive effect of judicial invalidation of acts of expropriation dwindles in comparison." *Id.*, at 435.[10]

Only in view of all these considerations did he conclude, *id.*, at 428:

> "[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

In short, *Sabbatino* held that the validity of a foreign act of state in certain circumstances is a "political ques-

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[10] Mr. Justice Harlan also observed that "[a]nother serious consequence" of suspending the act of state bar "would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade." 376 U. S., at 433. See also *id.*, at 437 (impact on flow of trade, though not security of title, even where sovereign is plaintiff). This consideration, of course, does not apply where, as here, the property seized is not an exportable commodity.

tion" not cognizable in our courts.[11] Only one—and not necessarily the most important—of those circumstances concerned the possible impairment of the Executive's conduct of foreign affairs. Even if this factor were absent in this case because of the Legal Adviser's statement of position, it would hardly follow that the act of state doctrine should not foreclose judicial review of the expropriation of petitioner's properties. To the contrary, the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a "political question." The Legal Adviser's letter does not purport to affect these considerations at all. In any event, when coupled with the possible consequences to the conduct of our foreign relations explored above, these considerations compel application of the act of state doctrine, notwithstanding the Legal Adviser's suggestion to the contrary.[12] The

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[11] Cf. *Baker* v. *Carr*, 369 U. S. 186, 211–212 (1962):

"Our cases in this field [of political questions involving foreign relations] seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

[12] A comparison of the facts in the *Bernstein* case, n. 1, *supra*, with the circumstances of this case reinforces this conclusion. As the Government itself has acknowledged, Brief for the United States as *Amicus Curiae* in *Sabbatino*, n. 7, *supra*, at 37–38:

"The circumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international

Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim.[13]

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tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of [the] State Department's letter. Moreover, the principle of payment of reparations by the successor German government had already been imposed, at the time of the *'Bernstein* letter,' upon the successor government, so that there was no chance that a suspension of the act of state doctrine would affect the negotiation of a reparations settlement."

On these facts the result, though not the rationale, in *Bernstein* may be defensible. See, *e. g.*, R. Falk, The Status of Law in International Society 407 and n. 12 (1970).

[13] My Brother REHNQUIST's opinion attempts to bolster its result by drawing an analogy between the act of state doctrine and the rule of deference to the Executive in the areas of sovereign immunity and recognition of foreign powers. That rule has itself been the subject of much debate and criticism. See generally, *e. g.*, R. Falk, The Role of Domestic Courts in the International Legal Order 139–169 (1964); Lillich, The Proper Role of Domestic Courts in the International Legal Order, 11 Va. J. Int'l L. 9, 9–27 (1970); Note, 53 Minn. L. Rev. 389 (1968). See also *Sabbatino*, 376 U. S., at 411 n. 12. The analogy, in any case, is not persuasive. When the Judicial Branch in the past has followed an Executive suggestion of immunity in behalf of a foreign government or accorded significant weight to the failure of the Executive to make such a suggestion, the result has been simply either to foreclose judicial consideration of the claim against that government or to allow the suit to proceed on the merits of the claim and any other defenses the government may have. See, *e. g.*, *Mexico* v. *Hoffman*, 324 U. S. 30 (1945); *Ex parte Peru*, 318 U. S. 578 (1943). Similarly, when the Judicial Branch has abided by an Executive determination of foreign sovereignty, the consequence has been merely to require or deny the application of various principles governing the attributes of sovereignty. See, *e. g.*, *United States* v. *Belmont*, 301 U. S. 324 (1937); *Russian Republic* v. *Cibrario*, 235 N. Y. 255, 139 N. E. 259 (1923). In no event has the judiciary necessarily been called upon to assess a claim under international law. The effect of following a *"Bernstein* letter," of course, is exactly the opposite—the Judicial Branch must reach a judgment despite

Sabbatino, as my Brother REHNQUIST's opinion notes, formally left open the validity of the *"Bernstein"* exception to the act of state doctrine. But that was only because the issue was not presented there. As six members of this Court recognize today, the reasoning of that case is clear that the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative.

IV

To find room for the *"Bernstein"* exception in *Sabbatino* does more than disservice to precedent. MR. JUSTICE REHNQUIST's opinion states: "Our holding is in no sense an abdication of the judicial function to the Executive Branch." With all respect, it seems patent that the contrary is true. The task of defining the contours of a political question such as the act of state doctrine is exclusively the function of this Court. *Baker* v. *Carr*, 369 U. S. 186 (1962), and cases cited therein; see R. Falk, The Status of Law in International Society 413 (1970). The *"Bernstein"* exception relinquishes the function to the Executive by requiring blind adherence to its requests that foreign acts of state be reviewed. Conversely, it politicizes the judiciary. For the Executive's invitation to lift the act of state bar can only be accepted at the expense of supplanting the political branch in its role as a constituent of the international law-making community. As *Sabbatino*, 376 U. S., at 432–433, indicated, it is the function of the Executive to act "not

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the possible absence of consensus on the applicable rules, the risk of irritation to sensitive concerns of other countries, and the danger of impairment to the conduct of our foreign policy. *E. g.*, Note, 12 Harv. Int'l L. J., at 575–577. See also *Sabbatino, supra*, at 438.

only as an interpreter of generally accepted and traditional rules, as [do] the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns." [14] The *"Bernstein"* exception, nevertheless, assigns the task of advocacy to the judiciary by calling for a judgment where consensus on controlling legal principles is absent. Note, 40 Fordham L. Rev. 409, 417 (1971). Thus, it countenances an exchange of roles between the judiciary

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[14] This consideration, it may be noted, resolves the paradox MR. JUSTICE WHITE, dissenting in *Sabbatino*, saw between the Court's finding there of an absence of consensus on the international rules governing expropriations and the Court's purpose to avoid embarrassment to the Executive in the conduct of external affairs. "I fail to see," he stated, "how greater embarrassment flows from saying that the foreign act does not violate clear and widely accepted principles of international law than from saying, as the Court does, that nonexamination and validation are required because there are no widely accepted principles to which to subject the foreign act." 376 U. S., at 465. There is, however, no inconsistency:

"The explicit holding in [*Sabbatino*] makes reference to the capacity of domestic courts and not to the status of the customary norms. All that *Sabbatino* says is that a domestic court is not an appropriate forum wherein to apply a rule of customary international law unless that rule is supported by a consensus at least wide enough to embrace the parties to the dispute. Such judicial self-restraint may not be appropriate if the forum is an international tribunal entrusted with competence by both sides, but the situation is different for a domestic court. The appearance of impartiality is as important to the formulation of authoritative law as is the actuality of impartiality. The [consequence] is that a domestic court, however manfully it struggles to achieve impartiality, will not be able to render an authoritative judgment when the adjudication requires it to decide whether the forum state or the foreign state is correct about its contentions as to the content of customary international law. The act of state doctrine, in the absence of a firm agreement on the rules of decision, acknowledges this incapacity of domestic courts." Falk, n. 12, *supra*, at 415.

and the Executive, contrary to the firm insistence in *Sabbatino* on the separation of powers.[15]

The consequence of adopting the *"Bernstein"* approach would only be to bring the rule of law both here at home and in the relations of nations into disrespect. Indeed, the fate of the individual claimant would be subject to the political considerations of the Executive Branch. Since those considerations change as surely as administrations change, similarly situated litigants would not be likely to obtain even-handed treatment. This is all too evident in the very case before us. The Legal Adviser's suggestion that the act of state doctrine does not apply here is carefully couched in terms applicable only to setoffs "against the Government of Cuba in this or like cases," see *supra*, at 781—that is, where the Executive finds in its discretion that invocation of the doctrine is not required in the interests of American foreign policy vis-à-vis Cuba. Note, 12 Harv. Int'l L. J. 557, 562, 572 (1971).[16] In *Zschernig* v. *Miller*, 389 U. S. 429 (1968), this Court struck down an Oregon escheat statute as an unconstitutional invasion of the National Government's power over external affairs, despite advice from the Executive that the law did not unduly interfere with the conduct of our foreign policy. Paraphrasing from what my Brother STEWART said there, *id.*, at 443 (concurring opinion), we must conclude here:

> "Resolution of so fundamental [an] issue [as the basic division of functions between the Executive

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[15] See *Sabbatino*, 376 U. S., at 423, 427–428: "The act of state doctrine does . . . have 'constitutional' underpinnings." And "its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."

[16] For an account of how political considerations may have affected a State Department determination in a specific case, see Note, 75 Harv. L. Rev. 1607, 1610–1611 (1962).

> and the Judicial Branches] cannot vary from day to day with the shifting winds at the State Department. Today, we are told, [judicial review of a foreign act of state] does not conflict with the national interest. Tomorrow it may." See also *id.*, at 434–435 (DOUGLAS, J.).

No less important than fair and equal treatment to individual litigants is the concern that decisions of our courts command respect as dispassionate opinions of principle. Nothing less will suffice for the rule of law. Yet the *"Bernstein"* approach is calculated only to undermine regard for international law. It is, after all, as *Sabbatino* said, 376 U. S., at 434–435, a "sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free-enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies." This is particularly so where, as under the *"Bernstein"* approach, the determination of international law is made to depend upon a prior political authorization. *E. g.*, R. Falk, The Role of Domestic Courts in the International Legal Order 93–94, 136–137 (1964).

V

MR. JUSTICE REHNQUIST's opinion finds support for the result it reaches in *National City Bank* v. *Republic of China*, 348 U. S. 356 (1955), and MR. JUSTICE DOUGLAS bases his decision on that case alone. *National City Bank* held that, by bringing suit in our courts, a foreign sovereign waives immunity on offsetting counterclaims, whether or not related to the sovereign's cause of action. Nothing in that decision spoke to the applicability of the act of state doctrine. My Brother REHNQUIST's opinion, nevertheless, seizes on language there that a sovereign

suing in our courts "wants our law" and so should be held bound by it as a matter of equity. In a similar vein, my Brother DOUGLAS states that "[i]t would . . . offend our sensibilities if Cuba could collect the amount owed on . . . [her claim] and not be required to account for any setoff." Yet, on the assumption that equitable principles are relevant to respondent's cause of action, see Note, 75 Harv. L. Rev. 1607, 1619 (1962), it is by no means clear that the balance of equity tips in petitioner's favor. It cannot be argued that by seeking relief in our courts on a claim that does not involve any act of state, respondent has waived the protection of the act of state doctrine in defense to petitioner's counterclaims. See *ibid.* Furthermore, as the Court of Appeals pointed out below, 442 F. 2d, at 535, petitioner "is seeking a windfall at the expense of other" claimants whose property Cuba has nationalized. Our Government has blocked Cuban assets in this country for possible use by the Foreign Claims Settlement Commission to compensate fairly all American nationals who have been harmed by Cuban expropriations. Although those assets are not now vested in the United States or authorized to be distributed to claimants, it is reasonable to assume that they will be if other efforts at settling claims with Cuba are unavailing. In that event, if petitioner prevails here, it will, in effect, have secured a preference over other claimants who were not so fortunate to have had Cuban assets within their reach and whose only relief is before the Claims Commission. Conversely, if respondent prevails, its recovery will become a vested asset for fair and ratable distribution to all claimants, including petitioner. See 431 F. 2d, at 403–404.

More important, reliance on *National City Bank* overlooks the fact that "our law" that respondent "wants" includes the act of state doctrine, to which we have adhered for decades, as the precedents on which *Sabbatino* re-

lied demonstrate. See n. 1, *supra*. As *Sabbatino* indicated, 376 U. S., at 438, the doctrine, "although it shares with the immunity doctrine a respect for sovereign states," serves important policies entirely independent of that rule. See n. 13, *supra*. And those policies, with one exception, see n. 10, *supra*, apply with full force in this case, as we have seen. Indeed, MR. JUSTICE DOUGLAS concedes as much by recognizing that the political-question rationale of *Sabbatino* would preclude a judgment for petitioner in excess of Cuba's claim. Why petitioner's counterclaims are any the less premised on a political question when they are stated only as offsets is not, and cannot rationally be, explained.

In *Sabbatino* itself the Court considered "whether Cuba's status as a plaintiff [seeking to recover the proceeds of property it had expropriated] . . . dictates a result at variance with the conclusions reached [requiring application of the act of state doctrine]." 376 U. S., at 437. The Court held that it did not, noting that "[t]he sensitivity in regard to foreign relations and the possibility of embarrassment of the Executive are, of course, heightened by the presence of a sovereign plaintiff. The rebuke to a recognized power would be more pointed were it a suitor in our courts." *Ibid.* The Court observed, too, *id.*, at 438:

> "Certainly the distinction proposed would sanction self-help remedies, something hardly conducive to a peaceful international order. Had [the defendant] not converted [the proceeds of the property Cuba had expropriated] . . . , Cuba could have relied on the act of state doctrine in defense of a claim brought . . . for the proceeds. It would be anomalous to preclude reliance on the act of state doctrine because of [the defendant's] unilateral action, however justified such action may have been under the circumstances."

These considerations, equally applicable here, together with the general policies underlying the act of state doctrine caused the Court to conclude that Cuba's status as a plaintiff was immaterial. But the Court went on to determine whether there were any remaining litigable issues for determination on remand and held that "any counterclaim [against Cuba] based on asserted invalidity [of its expropriation] must fail." *Id.*, at 439. *Sabbatino* thus answered the very point on which some of my Brethren now rely—and, furthermore, did so in the face of *National City Bank*, as the Court's discussion of that decision in *Sabbatino, id.*, at 438, shows.

LAIRD, SECRETARY OF DEFENSE, ET AL. *v.* NELMS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 71-573. Argued April 17, 1972—Decided June 7, 1972

Damage from sonic boom caused by military planes, where no negligence was shown either in the planning or operation of the flight, is not actionable under the Federal Tort Claims Act, which does not authorize suit against the Government on claims based on strict or absolute liability for ultrahazardous activity. *Dalehite* v. *United States*, 346 U. S. 15. Pp. 798–803.

442 F. 2d 1163, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 803. DOUGLAS, J., took no part in the consideration or decision of the case.

Richard B. Stone argued the cause for petitioners. On the brief were *Solicitor General Griswold, Assistant Attorney General Gray, Wm. Terry Bray, Alan S. Rosenthal,* and *Robert E. Kopp.*

George E. Allen, Sr., argued the cause and filed a brief for respondents.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents brought this action in the United States District Court under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b), 2671–2680. They sought recovery for property damage allegedly resulting from a sonic boom caused by California-based United States military planes flying over North Carolina on a training mission. The District Court entered summary judgment for petitioners, but on respondents' appeal the United States Court of

Appeals for the Fourth Circuit reversed. That court held that, although respondents had been unable to show negligence "either in the planning or operation of the flight," they were nonetheless entitled to proceed on a theory of strict or absolute liability for ultrahazardous activities conducted by petitioners in their official capacities. That court relied on its earlier opinion in *United States* v. *Praylou*, 208 F. 2d 291 (1953), which in turn had distinguished this Court's holding in *Dalehite* v. *United States*, 346 U. S. 15, 45 (1953). We granted certiorari. 404 U. S. 1037.

Dalehite held that the Government was not liable for the extensive damage resulting from the explosion of two cargo vessels in the harbor of Texas City, Texas, in 1947. The Court's opinion rejected various specifications of negligence on the part of Government employees that had been found by the District Court in that case, and then went on to treat petitioners' claim that the Government was absolutely or strictly liable because of its having engaged in a dangerous activity. The Court said with respect to this aspect of the plaintiffs' claim:

> "[T]he Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a 'negligent or wrongful act or omission' of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity." 346 U. S., at 44.

This Court's resolution of the strict-liability issue in *Dalehite* did not turn on the question of whether the law of Texas or of some other State did or did not recognize strict liability for the conduct of ultrahazardous activities. It turned instead on the question of whether the language of the Federal Tort Claims Act permitted

under any circumstances the imposition of liability upon the Government where there had been neither negligence nor wrongful act. The necessary consequence of the Court's holding in *Dalehite* is that the statutory language "negligent or wrongful act or omission of any employee of the Government," is a uniform federal limitation on the types of acts committed by its employees for which the United States has consented to be sued. Regardless of state law characterization, the Federal Tort Claims Act itself precludes the imposition of liability if there has been no negligence or other form of "misfeasance or nonfeasance," 346 U. S., at 45, on the part of the Government.

It is at least theoretically possible to argue that since *Dalehite* in discussing the legislative history of the Act said that "wrongful" acts could include some kind of trespass, and since courts imposed liability in some of the early blasting cases on the theory that the plaintiff's action sounded in trespass, liability could be imposed on the Government in this case on a theory of trespass which would be within the Act's waiver of immunity. We believe, however, that there is more than one reason for rejecting such an alternate basis of governmental liability here.

The notion that a military plane on a high-altitude training flight itself intrudes upon any property interest of an owner of the land over which it flies was rejected in *United States* v. *Causby*, 328 U. S. 256 (1946). There this Court, construing the Air Commerce Act of 1926, 44 Stat. 568, as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. § 401, said:

> "It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum.* But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared.

> Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." 328 U. S., at 260–261.

Thus, quite apart from what would very likely be insuperable problems of proof in connecting the passage of the plane over the owner's air space with any ensuing damage from a sonic boom, this version of the trespass theory is ruled out by established federal law. Perhaps the precise holding of *United States* v. *Causby, supra,* could be skirted by analogizing the pressure wave of air characterizing a sonic boom to the concussion that on occasion accompanies blasting, and treating the air wave striking the actual land of the property owner as a direct intrusion caused by the pilot of the plane in the mold of the classical common-law theory of trespass.

It is quite clear, however, that the presently prevailing view as to the theory of liability for blasting damage is frankly conceded to be strict liability for undertaking an ultrahazardous activity, rather than any attenuated notion of common-law trespass. See Restatement of Torts §§ 519, 520 (e); W. Prosser, Law of Torts § 75 (4th ed. 1971). While a leading North Carolina case on the subject of strict liability discusses the distinction between actions on the case and actions sounding in trespass that the earlier decisions made, it, too, actually grounds liability on the basis that he who engages in ultrahazardous activity must pay his way regardless of what precautions he may have taken. *Guilford Realty & Ins. Co.* v. *Blythe Bros. Co.,* 260 N. C. 69, 131 S. E. 2d 900 (1963).

More importantly, however, Congress in considering the Federal Tort Claims Act cannot realistically be said

to have dealt in terms of either the jurisprudential distinctions peculiar to the forms of action at common law or the metaphysical subtleties that crop up in even contemporary discussions of tort theory. See Prosser, *supra,* at 492–496. The legislative history discussed in *Dalehite* indicates that Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law under the doctrine of *respondeat superior,* but to exclude liability based solely on the ultrahazardous nature of an activity undertaken by the Government.

A House Judiciary Committee memorandum explaining the "discretionary function" exemption from the bill when that exemption first appeared in the draft legislation in 1942 made the comment that "the cases covered by that subsection would probably have been exempted . . . by judicial construction" in any event, but that the exemption was intended to preclude any possibility

> "that the act would be construed to authorize suit for damages against the Government growing out of a legally authorized activity, such as a flood-control or irrigation project, where no wrongful act or omission on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious . . . ." Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., ser. 13, pp. 65–66 (1942).

The same memorandum, after noting the erosion of the doctrine of sovereign immunity over the years, observed with respect to the bill generally:

> "Yet a large and highly important area remains in which no satisfactory remedy has been provided

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> for the wrongs of Government officers or employees, the ordinary 'commonlaw' type of tort, such as personal injury or property damage caused by the negligent operation of an automobile." *Id.*, at 39.

The type of trespass subsumed under the Act's language making the Government liable for "wrongful" acts of its employees is exemplified by the conduct of the Government agents in *Hatahley* v. *United States*, 351 U. S. 173, 181. Liability of this type under the Act is not to be broadened beyond the intent of Congress by dressing up the substance of strict liability for ultrahazardous activities in the garments of common-law trespass. To permit respondent to proceed on a trespass theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result.

Shortly after the decision of this Court in *Dalehite*, the facts of the Texas City catastrophe were presented to Congress in an effort to obtain legislative relief from that body. Congress, after conducting hearings and receiving reports, ultimately enacted a bill granting compensation to the victims in question. 69 Stat. 707; H. R. Rep. No. 2024, 83d Cong., 2d Sess. (1954); S. Rep. No. 2363, 83d Cong., 2d Sess. (1954); H. R. Rep. No. 1305, 84th Cong., 1st Sess. (1955); H. R. Rep. No. 1623, 84th Cong., 1st Sess. (1955); S. Rep. No. 684, 84th Cong., 1st Sess. (1955). At no time during these hearings was there any effort made to modify this Court's construction of the Tort Claims Act in *Dalehite*. Both by reason of *stare decisis* and by reason of Congress' failure to make any statutory change upon again reviewing the subject, we regard the principle enunciated in *Dalehite* as controlling here.

Since *Dalehite* held that the Federal Tort Claims Act did not authorize suit against the Government on claims

based on strict liability for ultrahazardous activity, the Court of Appeals in the instant case erred in reaching a contrary conclusion. While as a matter of practice within the Circuit it may have been proper to rely upon *United States* v. *Praylou*, 208 F. 2d 291, it is clear that the holding of the latter case permitting imposition of strict liability on the Government where state law permits it is likewise inconsistent with *Dalehite*. *Dalehite* did not depend on the factual question of whether the Government was handling dangerous property, as opposed to operating a dangerous instrument but, rather, on the Court's determination that the Act did not authorize the imposition of strict liability of any sort upon the Government. Indeed, even the dissenting opinion in *Dalehite* did not disagree with the conclusion of the majority on that point.

Our reaffirmation of the construction put on the Federal Tort Claims Act in *Dalehite* makes it unnecessary to treat the scope of the discretionary-function exemption contained in the Act, or the other matters dealt with by the Court of Appeals.

Reversed.

MR. JUSTICE DOUGLAS, having heard the argument, withdrew from participation in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

Under the Federal Tort Claims Act, the United States is liable for injuries to persons or property

> "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in

accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b).

The Court of Appeals in this case found that the law of North Carolina renders a person who creates a sonic boom absolutely liable for any injuries caused thereby, and that finding is not challenged here.[1] And while the petitioners argue that the conduct involved falls within one of the numerous express exceptions to the coverage of the Act contained in § 2680,[2] the Court today does not reach that issue. Rather, the Court holds that the words "negligent or wrongful act or omission" preclude the application to the United States of any state law under which persons may be held absolutely liable for injuries caused by certain kinds of conduct. In my view, this conclusion is not justified by the language or the history of the Act, and is plainly contrary to the statutory purpose. I therefore dissent.

In the vast majority of cases in the law of torts, liability is predicated on a breach of some legal duty owed by the defendant to the plaintiff, whether that duty involves exercising reasonable care in one's activities or refraining from certain activities altogether. The law of most jurisdictions, however, imposes liability for harm caused by certain narrowly limited kinds of activities even though those activities are not prohibited and even though the actor may have exercised the utmost care. Such conduct is "tortious," not because the actor is necessarily blameworthy, but because society has made

[1] The question whether damage caused by sonic booms is recoverable on a theory of absolute liability has received considerable attention from commentators, most of whom have concluded that there should be such recovery, at least under certain conditions. See, *e. g.*, Note, 32 J. Air Law & Commerce 596, 602–605 (1966); Note, 39 Tulane L. Rev. 145 (1964); Comment, 31 So. Cal. L. Rev. 259, 266–274 (1958); W. Prosser, Law of Torts 516 (4th ed. 1971).

[2] See n. 5, *infra*.

a judgment that while the conduct is so socially valuable that it should not be prohibited, it nevertheless carries such a high risk of harm to others, even in the absence of negligence, that one who engages in it should make good any harm caused to others thereby. See generally 2 F. Harper & F. James, Law of Torts 785–795, 815–816 (1956); W. Prosser, Law of Torts 442–496 (4th ed. 1971).

While the doctrine of absolute liability is not encountered in many situations even under modern tort law, it was nevertheless well established at the time the Tort Claims Act was enacted, and there is nothing in the language or the history of the Act to support the notion that this doctrine alone, among all the rules governing tort liability in the various States, was considered inapplicable in cases arising under the Act. The legislative history quoted by the Court relates solely to the "discretionary function" exception contained in § 2680, an exception upon which the Court specifically declines to rely.[3] As I read the Act and the legislative

[3] The Court's opinion refers to language in *Dalehite* v. *United States*, 346 U. S. 15, which in turn relied on a fragment of legislative history, for the proposition that the words "wrongful act" as used in § 1346 (b) refer only to trespasses. The legislative history cited by the Court in *Dalehite*, consisting of a statement by a Special Assistant to the Attorney General at a committee hearing, merely suggested trespass as one example of the kinds of conduct that would not be embraced by the word "negligence" but which the Act was intended to reach. As the Court today observes, many of the state cases applying what is essentially the doctrine of absolute liability for ultrahazardous activities speak in terms of "trespass." See, *e. g.*, *Guilford Realty & Ins. Co.* v. *Blythe Bros. Co.*, 260 N. C. 69, 131 S. E. 2d 900 (1963); *Enos Coal Mining Co.* v. *Schuchart*, 243 Ind. 692, 188 N. E. 2d 406 (1963); *Whitney* v. *Ralph Myers Contracting Corp.*, 146 W. Va. 130, 118 S. E. 2d 622 (1961). The similarity between the theories of trespass and absolute liability in the blasting cases leads the Court to conclude that the Act does not permit recovery on a "trespass" theory in this case because the Act does not permit recovery on an absolute-liability theory. But if Congress

history, the phrase "negligent or wrongful act or omission" was intended to include the entire range of conduct classified as tortious under state law.[4] The only intended exceptions to this sweeping waiver of governmental immunity were those expressly set forth and now collected in § 2680.[5] This interpretation was put upon

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intended, as the Court assumes, that "trespasses" be covered by the Act, I should think the similarity between the two theories would more logically lead to a conclusion that absolute-liability situations are likewise covered.

[4] A bill passed by the Senate in 1942 covered only actions based on the "negligence" of Government employees. S. 2221, 77th Cong., 2d Sess. The House committee substituted the phrase "negligent or wrongful act or omission," saying that the "committee prefers its language as it would afford relief for certain acts or omissions which may be wrongful but not necessarily negligent." H. R. Rep. No. 2245, 77th Cong., 2d Sess., 11. The language used by the House committee was carried over into the bill finally enacted in 1946, without further mention in the committee reports of the intended scope of the words "wrongful act."

[5] "The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

"(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

"(d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States.

"(e) Any claim arising out of an act or omission of any employee

the Act by the legislative committees that recommended its passage in 1946: "The present bill would establish a uniform system . . . permitting suit to be brought on *any tort claim* . . . with the exception of certain classes of torts *expressly exempted* from the operation of the act." (Emphasis supplied.) H. R. Rep. No. 1287, 79th Cong., 1st Sess., 3; S. Rep. No. 1400, 79th Cong., 2d Sess., 31. See Peck, Absolute Liability and the Federal Tort Claims Act, 9 Stan. L. Rev. 433, 441–450 (1957).

The Court rests its conclusion on language from *Dalehite* v. *United States,* 346 U. S. 15, where a four-man majority of the Court, in an opinion dealing primarily with the "discretionary function" exception, held the doctrine of absolute liability inapplicable in that extremely unusual case arising under the Federal Tort Claims Act. That language has been severely criticized;[6]

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of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

"(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

"(g) Repealed.

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

"(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

"(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

"(k) Any claim arising in a foreign country.

"(l) Any claim arising from the activities of the Tennessee Valley Authority.

"(m) Any claim arising from the activities of the Panama Canal Company.

"(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

[6] See, *e. g.,* Peck, Absolute Liability and the Federal Tort Claims Act, 9 Stan. L. Rev. 433 (1957); Jacoby, Absolute Liability under

it has not since been relied upon in any decision of this Court; and it was rejected as a general principle by at least one Court of Appeals less than a year after *Dalehite* was decided. *United States* v. *Praylou*, 208 F. 2d 291, 295. Moreover, *Dalehite* represented an approach to interpretation of the Act that was abruptly changed only two years later in *Indian Towing Co.* v. *United States*, 350 U. S. 61. That decision rejected the proposition that the United States was immune from liability where the activity involved was "governmental" rather than "proprietary"—a proposition that seemingly had been established in *Dalehite*.[7] And while the *Dalehite* opinion explicitly created a presumption in favor of sovereign immunity, to be overcome only where relinquishment by Congress was "clear," 346 U. S., at 30–31, the Court in *Indian Towing* recognized that the Tort Claims Act "cuts the ground from under" the doctrine of sovereign immunity, and cautioned that a court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." 350 U. S., at 65, 69. See also *Rayonier, Inc.* v. *United States*, 352 U. S. 315, 319–320. These developments, together with an approving citation of the *Praylou* case in *Rayonier*, *supra*, at 319 n. 2, have until today been generally understood to mean that the language in *Dalehite* rejecting the absolute-liability doctrine had been implicitly abandoned.[8]

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the Federal Tort Claims Act, 24 Fed. Bar J. 139 (1964); 2 F. Harper & F. James, Law of Torts 860 (1956).

[7] Four members of the Court dissented, saying that the failure of Congress to amend the Act after *Dalehite* should have been taken as indicating approval by Congress of the interpretation given to the Act in that case. 350 U. S., at 74.

[8] See Peck, *supra*, n. 6, at 435; Jacoby, *supra*, n. 6, at 140; Comment, 31 So. Cal. L. Rev. 259, 266 n. 56; Dostal, Aviation Law under the Federal Tort Claims Act, 24 Fed. Bar J. 165, 177 (1964).

The rule announced by the Court today seems to me contrary to the whole policy of the Tort Claims Act. For the doctrine of absolute liability is applicable not only to sonic booms, but to other activities that the Government carries on in common with many private citizens. Absolute liability for injury caused by the concussion or debris from dynamite blasting, for example, is recognized by an overwhelming majority of state courts.[9] A private person who detonates an explosion in the process of building a road is liable for injuries to others caused thereby under the law of most States even though he took all practicable precautions to prevent such injuries, on the sound principle that he who creates such a hazard should make good the harm that results. Yet if employees of the United States engage in exactly the same conduct with an identical result, the United States will not, under the principle announced by the Court today, be liable to the injured party. Nothing in the language or the legislative history of the Act compels such a result, and we should not lightly conclude that Congress intended to create a situation so much at odds with common sense and the basic rationale of the Act. We recognized that rationale in *Rayonier, supra,* a case involving negligence by employees of the United States in controlling a forest fire:

> "Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each tax-

[9] See, *e. g., Whitman Hotel Corp.* v. *Elliott & Watrous Eng. Co.,* 137 Conn. 562, 79 A. 2d 591 (1951); *Louden* v. *City of Cincinnati,* 90 Ohio St. 144, 106 N. E. 970 (1914); *Thigpen* v. *Skousen & Hise,* 64 N. M. 290, 327 P. 2d 802 (1958); *Wallace* v. *A. H. Guion & Co.,* 237 S. C. 349, 117 S. E. 2d 359 (1960); and cases cited in n. 3, *supra.* See generally W. Prosser, Law of Torts 514 (4th ed. 1971).

> payer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees." 352 U. S., at 320.

For the reasons stated, I would hold that the doctrine of absolute liability is applicable to conduct of employees of the United States under the same circumstances as those in which it is applied to the conduct of private persons under the law of the State where the conduct occurs. That holding would not by itself be dispositive of this case, however, for the petitioners argue that liability is precluded by the "discretionary function" exception in the Act. While the Court does not reach this issue, I shall state briefly the reasons for my conclusion that the exception is inapplicable in this case.

No right of action lies under the Tort Claims Act for any claim

> "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U. S. C. § 2680 (a).

The Assistant Attorney General who testified on the bill before the House committee indicated that this provision was intended to create no exceptions beyond those that courts would probably create without it:

> "[I]t is likely that the cases embraced within that subsection would have been exempted from [a bill

> that did not include the exception] by judicial construction. It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but [the recommended bill] makes this specific." Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., ser. 13, p. 29.

The *Dalehite* opinion seemed to say that no action of a Government employee could be made the basis for liability under the Act if the action involved "policy judgment and decision." 346 U. S., at 36. Decisions in the courts of appeals following *Dalehite* have interpreted this language as drawing a distinction between "policy" and "operational" decisions, with the latter falling outside the exception.[10] That distinction has bedeviled the courts that have attempted to apply it to torts outside routine categories such as automobile accidents, but there is no need in the present case to explore the limits of the discretionary function exception.

The legislative history indicates that the purpose of this statutory exception was to avoid any possibility that policy decisions of Congress, of the Executive, or of administrative agencies would be second-guessed by courts in the context of tort actions.[11] There is no such danger

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[10] See, *e. g.*, *Eastern Air Lines* v. *Union Trust Co.*, 221 F. 2d 62, aff'd, 350 U. S. 907; *Fair* v. *United States*, 234 F. 2d 288; *Hendry* v. *United States*, 418 F. 2d 774. For a thorough discussion of the "policy/operational" distinction that has developed, see Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act, 57 Geo. L. J. 81 (1968).

[11] The policy behind the exception is explained by one leading commentator as follows: "[A]lmost no one contends that there should be compensation for all the ills that result from governmental operations. No one, for instance, suggests that there should be liability for the injurious consequence of political blunders such as the unwise imposition of tariff duties or the premature lifting of

in this case, for liability does not depend upon a judgment as to whether Government officials acted irresponsibly or illegally. Rather, once the creation of sonic booms is determined to be an activity as to which the doctrine of absolute liability applies, the only questions for the court relate to causation and damages. Whether or not the decision to fly a military aircraft over the respondents' property, at a given altitude and at a speed three times the speed of sound, was a decision at the "policy" or the "operational" level, the propriety of that decision is irrelevant to the question of liability in this case, and thus the discretionary function exception does not apply.

OPA controls. . . . The separation of powers in our form of government and a decent regard by the judiciary for its co-ordinate branches should make courts reluctant to sit in judgment on the wisdom or reasonableness of legislative or executive political action. Moreover, courts are not particularly well suited to pursue the examinations that would be necessary to make this kind of judgment." James, The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity, 10 U. Fla. L. Rev. 184 (1957).

AIKENS *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 68–5027. Argued January 17, 1972—Decided June 7, 1972

California Supreme Court decision invalidating death penalty under state constitution has mooted this case, where certiorari was granted to consider whether death penalty comports with Federal Constitution.

70 Cal. 2d 369, 450 P. 2d 258, certiorari dismissed.

Anthony G. Amsterdam argued the cause for petitioner. With him on the brief were *Jerome B. Falk, Jr.*, *Paul N. Halvonik*, *Michael Meltsner*, *Jack Greenberg*, *James M. Nabrit III*, *Charles Stephen Ralston*, *Jack Himmelstein*, and *Elizabeth B. Dubois*.

Ronald M. George, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Evelle J. Younger*, Attorney General, and *William E. James*, Assistant Attorney General.

Briefs of *amici curiae* were filed by *John E. Havelock*, Attorney General, for the State of Alaska; by *Willard J. Lassers* and *Elmer Gertz* for the National Council of the Churches of Christ in the United States et al.; by *Leo Pfeffer* for the Synagogue Council of America and its Constituents et al.; by *Paul Raymond Stone* for the West Virginia Council of Churches et al.; by *Donald M. Wessling* for the Committee of Psychiatrists for Evaluation of the Death Penalty; by *Gerald H. Gottlieb*, *Melvin L. Wulf*, and *Sanford Jay Rosen* for the American Civil Liberties Union; by *Chauncey Eskridge*, *Mario G. Obledo*, *Leroy D. Clark*, *Nathaniel R. Jones*, and *Vernon Jordan* for the National Association for the Advancement of Colored People et al.; by *Marshall J. Hartman* for the National Legal Aid and Defender Association; by

Michael V. DiSalle for Edmund G. Brown et al.; by *Hilbert P. Zarky* for James V. Bennett et al.; and by *Luke McKissack, pro se.*

PER CURIAM.

Petitioner in this case, which has been orally argued and is now *sub judice,* has filed a Suggestion of Mootness and Motion for Remand based on the intervening decision of the California Supreme Court in *People* v. *Anderson,* 6 Cal. 3d 628, 493 P. 2d 880 (1972). That decision declared capital punishment in California unconstitutional under Art. 1, § 6, of the state constitution. The decision rested on an adequate state ground and the State's petition for writ of certiorari was denied. 406 U. S. 958. The California Supreme Court declared in the *Anderson* case that its decision was fully retroactive and stated that any prisoner currently under sentence of death could petition a superior court to modify its judgment. Petitioner thus no longer faces a realistic threat of execution, and the issue on which certiorari was granted—the constitutionality of the death penalty under the Federal Constitution—is now moot in his case. Accordingly the writ of certiorari is dismissed.

Reporter's Note

The next page is purposely numbered 901. The numbers between 814 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM APRIL 21 THROUGH JUNE 7, 1972

APRIL 21, 1972

Miscellaneous Orders

No. A–1096. BROWN ET AL. *v.* APODACA ET AL.; and

No. A–1097. NORVELL, ATTORNEY GENERAL OF NEW MEXICO *v.* APODACA. Sup. Ct. N. M. Applications for stay having been filed on April 19, 1972, and responses thereto filed late yesterday afternoon, presented to MR. JUSTICE WHITE, and by him referred to the Court, judgment of the Supreme Court of New Mexico entered on April 17, 1972, which among other things ordered exclusion from the ballot of candidates who have not paid the statutory filing fees, is hereby stayed until Tuesday, April 25, 1972, or further order of the Court.

No. A–1105. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* MILLICAN. D. C. N. D. Ga. Application for stay presented to MR. JUSTICE POWELL, and by him referred to the Court, granted. It is ordered that the order of the United States District Court for the Northern District of Georgia, of April 19, 1972, in Civil Action File No. 16401, be, and the same is hereby, stayed pending further order of this Court.

No. A–1106. GEORGIA ET AL. *v.* UNITED STATES. D. C. N. D. Ga. Application for stay presented to MR. JUSTICE POWELL, and by him referred to the Court, granted. It is ordered that the order of the United States District Court for the Northern District of Georgia, of April 19, 1972, in Civil Action File No. 16373, be, and the same is hereby, stayed pending further order of this Court. MR. JUSTICE MARSHALL is of the opinion that the application should be denied.

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APRIL 24, 1972

Dismissal Under Rule 60

No. 71–1057. STANDKE ET AL. *v.* B. E. DARBY & SONS, INC. Sup. Ct. Minn. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 291 Minn. 468, 193 N. W. 2d 139.

Affirmed on Appeal

No. 71–975. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* CHICAGO & NORTH WESTERN RAILWAY CO. ET AL. Affirmed on appeal from D. C. C. D. Cal. MR. JUSTICE MARSHALL took no part in the consideration or decision of this appeal.

Appeals Dismissed

No. 70–5093. DANIELS *v.* HIRSHBERG, HOSPITAL SUPERINTENDENT. Appeal from Sup. Ct. Fla. dismissed as moot. Reported below: 243 So. 2d 144.

No. 71–1101. REITZ ET UX. *v.* TOWN OF VANDEN BROEK. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. MR. JUSTICE STEWART would dismiss the appeal as moot. Reported below: 53 Wis. 2d 87, 191 N. W. 2d 913.

No. 71–1135. RIDGILL *v.* GULF RESTON, INC., ET AL. Appeal from Sup. Ct. Va. Motion to consider late-docketed appeal granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

*Miscellaneous Orders**

No. A–1053. MCKENNA *v.* UNITED STATES. C. A. 7th Cir. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

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*For Court's order prescribing amendments to the Federal Rules of Criminal Procedure and an amendment to the Federal Rules of Appellate Procedure, see *post*, p. 981.

No. A–1085. GARRISON *v.* UNITED STATES. C. A. 5th Cir. Application for stay presented to MR. JUSTICE DOUGLAS and by him referred to the Court, denied.

No. A–1090. HOLT *v.* CITY OF RICHMOND ET AL. C. A. 4th Cir. Application to enjoin elections for City Council of the city of Richmond, Virginia, scheduled for May 2, 1972, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. MR. JUSTICE WHITE and MR. JUSTICE POWELL took no part in the consideration or decision of this application.

THE CHIEF JUSTICE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, concurring.

In joining in MR. JUSTICE BLACKMUN's opinion concurring in the judgment in *Perkins* v. *Matthews*, 400 U. S. 379, 397 (1971), I indicated that "[g]iven the decision in *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969)," the result reached by the Court in *Perkins* followed. The instant motion for a stay is not an appropriate occasion to reconsider the holdings in *Allen* and *Perkins*. Hence, I see no alternative but to grant the requested stay of the May 2, 1972, election. *Perkins* squarely held that an annexation enlarging a city's number of eligible voters constitutes a change of a "standard, practice, or procedure with respect to voting" within the meaning of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c. That being the case, as stated in the memorandum of the United States as *amicus curiae* filed in this matter in the United States District Court for the Eastern District of Virginia, "[t]he legal effect of the . . . objection by the Attorney General, when coupled with the absence of a declaratory judgment from the United States District Court, District of Columbia, is to preclude the city from holding an election on an at-large basis."

No. A–1070. AERO MAYFLOWER TRANSIT CO., INC., ET AL. *v.* UNITED STATES ET AL. D. C. S. D. Ind. Application for extension of time in which to docket appeal presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–1096. BROWN ET AL. *v.* APODACA ET AL.; and

No. A–1097. NORVELL, ATTORNEY GENERAL OF NEW MEXICO *v.* APODACA. Sup. Ct. N. M. Applications for stay denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN are of the opinion that the applications should be granted. Reported below: 83 N. M. 663, 495 P. 2d 1379.

No. 71–110. GELBARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 404 U. S. 990.] Motion of petitioners for leave to file supplemental brief after argument granted.

No. 71–651. CALIFORNIA *v.* KRIVDA ET AL. [Certiorari granted, 405 U. S. 1039.] Motion of respondents for appointment of counsel granted. It is ordered that Roger S. Hanson, Esquire, of Woodland Hills, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondents in this case.

No. 71–685. LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL.; and

No. 71–691. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS, ET AL. *v.* SHAPIRO ET AL. [Certiorari granted, 405 U. S. 1039.] Motion of petitioners to advance oral argument denied.

No. 71–1190. SUMMERS *v.* CENARRUSA, SECRETARY OF STATE OF IDAHO, ET AL. Appeal from D. C. Idaho. Motions to accelerate filing of briefs and to advance oral argument denied.

No. A–1069 (71–1024). SIXTY-SEVENTH MINNESOTA STATE SENATE *v.* BEENS ET AL.; and

No. A–1069 (71–1145). SIXTY-SEVENTH MINNESOTA STATE SENATE *v.* BEENS ET AL. Application for temporary stay presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, granted pending further order of the Court.

No. 71–1317. SCHOOL BOARD OF THE CITY OF NORFOLK ET AL. *v.* BREWER ET AL. C. A. 4th Cir. Motion to advance denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion. Reported below: 456 F. 2d 943.

No. 71–6130. MOORE *v.* SMITH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted

No. 71–738. MESCALERO APACHE TRIBE *v.* JONES, COMMISSIONER, BUREAU OF REVENUE OF NEW MEXICO, ET AL. Ct. App. N. M. Motions of Agua Caliente Band of Mission Indians and Association on American Indian Affairs, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 83 N. M. 158, 489 P. 2d 666.

No. 71–1134. ROADEN *v.* KENTUCKY. Ct. App. Ky. Certiorari granted limited to Question 1 presented by the petition which reads as follows:

"1. In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process of law?"

Reported below: 473 S. W. 2d 814.

Certiorari Denied. (See also No. 71–1135, *supra.*)

No. 71–997. MCGINNIS, CORRECTION COMMISSIONER, ET AL. *v.* POLLACK. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 833.

No. 71–1000. BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* UNITED STATES;

No. 71–1010. JACKSONVILLE TERMINAL CO. *v.* UNITED STATES; and

No. 71–1014. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 418.

No. 71–1047. WALLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–1084. ANDERSON ET AL., TRADING AS ANDERSON SEAFOOD CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 567.

No. 71–1102. ANTONIOLI ET AL. *v.* LEHIGH COAL & NAVIGATION CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 1171.

No. 71–1106. UNITED MINE WORKERS OF AMERICA *v.* YABLONSKI ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 147 U. S. App. D. C. 193, 454 F. 2d 1036.

No. 71–1126. SOCIETE ANONYME DE GERANCE ET D'ARMEMENT *v.* JOSEPH MULLER CORPORATION ZURICH. C. A. 2d Cir. Certiorari denied. Reported below: 451 F. 2d 727.

No. 71–1128. KELEMEN ET AL. *v.* SERBIAN ORTHODOX CHURCH CONGREGATION OF ST. DEMETRIUS OF AKRON. Sup. Ct. Ohio. Certiorari denied.

No. 71–1138. CROSS CONTRACTING CO. *v.* LAW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 408.

No. 71–1164. WATTS *v.* MYLIUS. Ct. App. Ga. Certiorari denied. Reported below: 124 Ga. App. 475, 184 S. E. 2d 195.

No. 71–1181. FLANAGAN ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 38 App. Div. 2d 645, 327 N. Y. S. 2d 119.

No. 71–1197. RYAN ET AL. *v.* J. WALTER THOMPSON CO. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 444.

No. 71–1208. ROSE *v.* ROSE ET AL. Cir. Ct., Oakland County, Mich. Certiorari denied.

No. 71–5740. WORLEY *v.* BUDGET CREDIT, INC. C. A. 6th Cir. Certiorari denied.

No. 71–5788. PAULINO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 71–5794. WELLS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 51 Wis. 2d 477, 187 N. W. 2d 328.

No. 71–5801. WINWARD *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 6 Ore. App. 174, 485 P. 2d 1251.

No. 71–5852. COOPERSMITH *v.* TOWN OF GRAND LAKE ET AL. C. A. 10th Cir. Certiorari denied.

No. 71–6118. WILLIAMS *v.* STIRE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 783.

No. 71–6121. TIMMONS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 257 S. C. 193, 184 S. E. 2d 708.

No. 71–6123. STINSON *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–6126. SCHREINER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–6124. CHAPMAN *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 1209.

No. 71–6128. VANDERHORST *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 257 S. C. 114, 184 S. E. 2d 540.

No. 71–6131. FOSTER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 263 Md. 388, 283 A. 2d 411.

No. 71–6132. BRYANT *v.* PICKETT, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–6133. JORDAN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 71–6134. ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 413.

No. 71–6135. KING *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 191 N. W. 2d 650.

No. 71–6136. WEAST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 71–6140. ROBERTS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, 474 S. W. 2d 152.

No. 71–6142. MEAD *v.* MEIER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 449 F. 2d 732.

No. 71–6143. BRANCH ET AL. *v.* ORISCELLO, SHERIFF, ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–6145. HOLMES *v.* UNITED STATES; and

No. 71–6157. MATTHEWS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 453 F. 2d 950.

No. 71–6144. FAY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–6147. EARIN *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 376.

No. 71–6148. KUJACA *v.* DALY. C. A. 7th Cir. Certiorari denied.

No. 71–6149. EDWARDS *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 454 F. 2d 1106.

No. 71–6150. MCGARRITY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 1206.

No. 71–6151. MOORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 446 F. 2d 448.

No. 71–6159. WILSON *v.* ROWE, INDUSTRIAL SCHOOL SUPERINTENDENT. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 585.

No. 71–6160. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6162. REDDEN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 70–5417. HOLMES *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL are of the opinion that certiorari should be granted. Reported below: 258 La. 221, 245 So. 2d 707.

No. 71–1023. CRANSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 123.

No. 71–964. PENNSYLVANIA *v.* WARE. Sup. Ct. Pa. The order of this Court dated March 20, 1972 [405 U. S. 987], insofar as it granted the petition for writ of certiorari, is vacated. Certiorari denied, it appearing that the judgment below rests upon an adequate state ground. Reported below: 446 Pa. 52, 284 A. 2d 700.

No. 71–977. SHEPHERD *v.* OKLAHOMA. Ct. Crim. App. Okla. Motions to dispense with printing petition and respondent's briefs granted. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 489 P. 2d 529.

No. 71–5845. COLEMAN *v.* CRAMER. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6120. SHIELDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted Reported below: 453 F. 2d 1235.

No. 71–1144. MILSTEIN ET AL. *v.* GAF CORP.; and No. 71–1161. GAF CORP. *v.* MILSTEIN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART is of the opinion that certiorari should be granted in No. 71–1144. Reported below: 453 F. 2d 709.

No. 71–5423. MOSES ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 79 Wash. 2d 104, 483 P. 2d 832.

No. 71–6141. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 452 F. 2d 638.

No. 71–6152. UNDERWOOD *v.* ROUSE ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

Rehearing Denied

No. 70–5058. LYNCH ET AL. *v.* HOUSEHOLD FINANCE CORP. ET AL., 405 U. S. 538;

No. 71–247. RABE *v.* WASHINGTON, 405 U. S. 313;

No. 71–600. STATE BOARD OF ELECTION COMMISSIONERS ET AL. *v.* EVERS ET AL., 405 U. S. 1001;

No. 71–852. C. D. CONSTRUCTION CORP. *v.* COMMISSIONER OF INTERNAL REVENUE, 405 U. S. 988;

No. 71–853. GREENBERG *v.* UNITED STATES, 405 U. S. 988;

No. 71–948. GIPE, GUARDIAN *v.* DEMPSEY ET AL., 405 U. S. 990;

No. 71–987. MOODY *v.* MOODY, 405 U. S. 990;

No. 71–1009. LINDAUER *v.* OKLAHOMA CITY URBAN RENEWAL AUTHORITY ET AL., 405 U. S. 1017;

No. 71–1061. ARNESON PRODUCTS, INC., ET AL. *v.* BLUMENFELD, 405 U. S. 1017;

No. 71–5127. HARDEE *v.* NELSON, WARDEN, 404 U. S. 1060;

No. 71–5428. LIPSCOMB *v.* UNITED STATES, 404 U. S. 1021;

No. 71–5545. COLLINS *v.* MICHIGAN, 405 U. S. 991;

No. 71–5624. ALCALA *v.* WYOMING, 405 U. S. 997;

No. 71–5817. BURNS *v.* COLUMBIA PICTURES INTERNATIONAL CORP. ET AL., 405 U. S. 991; and

No. 71–5883. BIBLE *v.* ARIZONA ET AL., 405 U. S. 994. Petitions for rehearing denied.

No. 71–5375. STANLEY *v.* UNITED STATES, 404 U. S. 996; and

No. 71–5771. MUNCASTER *v.* UNITED STATES, 405 U. S. 979. Motions for leave to file petitions for rehearing denied.

MAY 5, 1972

Miscellaneous Orders

No. A–1106. GEORGIA ET AL. *v.* UNITED STATES. D. C. N. D. Ga. Application of the United States to vacate stay order of this Court heretofore granted on April 21, 1972 [*ante,* p. 901], denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE STEWART are of the opinion that the application should be granted.

No. A–1116. ESSEX, SUPERINTENDENT OF PUBLIC SCHOOLS OF OHIO, ET AL. *v.* WOLMAN ET AL. D. C. S. D. Ohio. Application for stay of order of the United States District Court for the Southern District of Ohio, Civ. No. 71–396, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST are of the opinion that the application should be granted.

No. A–1121. LUROS ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

MAY 8, 1972

Dismissal Under Rule 60

No. 70–5005. TERRY *v.* CALIFORNIA. Sup. Ct. Cal. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 2 Cal. 3d 362, 466 P. 2d 961.

MAY 12, 1972

Miscellaneous Order

No. A–1179. KLEINDIENST, ACTING ATTORNEY GENERAL, ET AL. *v.* WASHINGTON POST CO. ET AL. D. C. D. C. Application of the Solicitor General for stay of judgment of the United States District Court for the District of

Columbia (Civ. Action No. 467–72), presented to THE CHIEF JUSTICE and by him referred to the Court, granted pending appeal to the United States Court of Appeals for the District of Columbia Circuit. MR. JUSTICE DOUGLAS would deny stay and leave Judge Gesell's order in effect pending appeal. See Vanden Heuvel, The Press and the Prisons, 11 Col. Journalism Rev. 35 (May/June 1972). MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL are of the opinion that the application should be denied.

MAY 15, 1972

Affirmed on Appeal

No. 71–1156. GRIVETTI ET AL. *v.* ILLINOIS STATE ELECTORAL BOARD ET AL.; and

No. 71–1246. INDEPENDENT VOTERS OF ILLINOIS ET AL. *v.* LEWIS, SECRETARY OF STATE OF ILLINOIS, ET AL. Affirmed on appeals from D. C. N. D. Ill. Reported below: 335 F. Supp. 779.

No. 71–1176. OSWALD, CORRECTION COMMISSIONER, ET AL. *v.* GESICKI ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 336 F. Supp. 365 and 371.

No. 71–5872. VAN EEGHEN *v.* FLORIDA ET AL. Affirmed on appeal from D. C. M. D. Fla.

Appeals Dismissed

No. 71–801. COUNTY OF ALAMEDA ET AL. *v.* CALIFORNIA WELFARE RIGHTS ORGANIZATION ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 5 Cal. 3d 730, 488 P. 2d 953.

No. 71–6360. TOCZAUER *v.* STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 71–6256. ALERS *v.* SUPERIOR COURT OF PUERTO RICO. Appeal from Sup. Ct. P. R. dismissed for want of substantial federal question.

No. 71–1094. CROWDER *v.* GEORGIA ET AL. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 228 Ga. 436, 185 S. E. 2d 908.

No. 71–6372. CLEARY *v.* DISTRICT OF COLUMBIA. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would postpone consideration of question of jurisdiction to hearing of case on the merits.

Certiorari Granted—Vacated and Remanded

No. 71–5515. METCALF ET AL. *v.* SWANK, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Carter* v. *Stanton,* 405 U. S. 669. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case. Reported below: 444 F. 2d 1353.

Miscellaneous Orders

No. A–1105. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* MILLICAN. D. C. N. D. Ga. Motion of appellee to vacate stay order of this Court dated April 21, 1972 [*ante,* p. 901], denied.

No. A–1165. IN RE DISBARMENT OF MORTON. It is ordered that William M. Morton, Jr., of St. Joseph, Missouri, be suspended from the practice of law in this Court and that a rule to show cause issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 27, Orig. OHIO *v.* KENTUCKY. Report of Special Master, upon motion of State of Ohio, received and ordered filed. Exceptions, if any, with supporting briefs may be filed within 60 days. Reply briefs, if any, may be filed within 30 days of receipt of exceptions. [For earlier orders herein, see, *e. g.*, 404 U. S. 933.]

No. 71–718. MCGINNIS, CORRECTION COMMISSIONER, ET AL. *v.* ROYSTER ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 405 U. S. 986.] Motion of appellees for leave to proceed *in forma pauperis* granted.

No. 71–1016. FEDERAL POWER COMMISSION *v.* LOUISIANA POWER & LIGHT CO. ET AL.; and

No. 71–1040. UNITED GAS PIPE LINE CO. ET AL. *v.* LOUISIANA POWER & LIGHT CO. ET AL. C. A. 5th Cir. [Certiorari granted, 405 U. S. 973.] Motion of Mobile Gas Service Corp. et al. for leave to file supplemental *amici curiae* brief after argument granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71–5908. CHAMBERS *v.* MISSISSIPPI. Sup. Ct. Miss. [Certiorari granted, 405 U. S. 987.] Motion of Ramsey Clark to permit Peter Westen to argue orally *pro hac vice* on behalf of petitioner granted.

No. 71–6242. BRADLEY *v.* WINGO, WARDEN;

No. 71–6255. BRISBON *v.* ELROD, SHERIFF, ET AL.; and

No. 71–6315. WOOTEN *v.* WINGO, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–6186. STUDENTS OPPOSING UNFAIR PRACTICES, INC. *v.* BAZELON, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus and/or certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that the motion should be granted.

No. 71–6219. REESE ET AL. *v.* MEIER, PRISON DIRECTOR, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 71–6164. LEVY *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ET AL.;

No. 71–6261. ANDERSON *v.* TURRENTINE, U. S. DISTRICT JUDGE; and

No. 71–6270. WION *v.* AARAJ, U. S. DISTRICT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 71–1193. UNITED STATES *v.* ENMONS ET AL. Appeal from D. C. E. D. La. Probable jurisdiction noted. Reported below: 335 F. Supp. 641.

No. 71–834. MCCLANAHAN *v.* ARIZONA TAX COMMISSION. Appeal from Ct. App. Ariz. Probable jurisdiction noted and case set for oral argument with No. 71–738 [*Mescalero Apache Tribe* v. *Jones*, certiorari granted, *ante*, p. 905]. Reported below: 14 Ariz. App. 452, 484 P. 2d 221.

Certiorari Granted

No. 71–1043. HELLER *v.* NEW YORK. Ct. App. N. Y. Certiorari granted and case set for oral argument with No. 71–1134 [*Roaden* v. *Kentucky*, certiorari granted, *ante*, p. 905]. Reported below: 29 N. Y. 2d 319, 277 N. E. 2d 651.

No. 71–1136. TILLMAN ET AL. *v.* WHEATON-HAVEN RECREATION ASSN., INC., ET AL. C. A. 4th Cir. Motion to strike brief of respondents, except McIntyre, denied. Certiorari granted. Reported below: 451 F. 2d 1211.

No. 71–6272. ROBINSON *v.* NEIL, WARDEN. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 452 F. 2d 370.

No. 71–5656. PHILPOTT ET AL. *v.* ESSEX COUNTY WELFARE BOARD. Sup. Ct. N. J. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 59 N. J. 75, 279 A. 2d 806.

Certiorari Denied. (See also Nos. 71–1094 and 71–6372, *supra.*)

No. 71–849. GRIMES *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–980. POWELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 251 Ark. 46, 471 S. W. 2d 333.

No. 71–986. CRESTFIELD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 471 S. W. 2d 50.

No. 71–1049. ALTOM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 289.

No. 71–1064. GRUNBERGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 704.

No. 71–1066. COLASURDO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 585.

No. 71–1083. COBLENTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 503.

No. 71–1086. MASIELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1087. REAM *v.* OHIO. Ct. App. Ohio, Hancock County. Certiorari denied.

No. 71–1088. MORADO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 167.

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No. 71–1091. CASTELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–1092. STAR OFFICE SUPPLY CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied.

No. 71–1095. CONTINENTAL INSURANCE CO. *v.* BYRNE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 257.

No. 71–1100. ILLINOIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 297.

No. 71–1112. GRIZAFFI ET AL. *v.* FEDERAL SAVINGS & LOAN INSURANCE CORP., RECEIVER. C. A. 7th Cir. Certiorari denied. Reported below: 460 F. 2d 422.

No. 71–1113. UNION CARBIDE CORP. *v.* VOUTSIS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 889.

No. 71–1114. FIOTTO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 454 F. 2d 252.

No. 71–1116. CRUZ ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 184.

No. 71–1117. WIDELSKI ET UX. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 1.

No. 71–1120. SCHULMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 323.

No. 71–1124. LIDDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 F. 2d 509.

No. 71–1129. BEL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 683.

No. 71–1131. HAMLET *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied.

No. 71–1137. ROTHMAN, RECEIVER *v.* PACIFIC TELEPHONE & TELEGRAPH CO. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 848.

No. 71–1140. SISALCORDS DO BRAZIL, LTD. *v.* FIACAO BRASILEIRA DE SISAL, S. A. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 419.

No. 71–1143. YOHANES *v.* AYERS STEAMSHIP CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 349.

No. 71–1153. MEYER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 472 S. W. 2d 479.

No. 71–1154. OTIS ENGINEERING CORP. *v.* GUIMBELLOT. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 870.

No. 71–1155. FIELDS, GUARDIAN, ET AL. *v.* TRAVELERS INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 451 F. 2d 1292.

No. 71–1163. WING *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 490 P. 2d 1376.

No. 71–1166. ORMENTO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1172. UNITED STATES STEEL CORP. ET AL. *v.* FORTNER ENTERPRISES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 1095.

No. 71–1183. GUTHRIE *v.* TAYLOR ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 703, 185 S. E. 2d 193.

No. 71–1185. DESHOTELS ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 961.

No. 71–1189. ANDREW, ADMINISTRATRIX *v.* BENDIX CORP. C. A. 6th Cir. Certiorari denied. Reported below: 452 F. 2d 961.

No. 71–1196. COREY ET AL. *v.* STATE SAVINGS & LOAN ASSN. ET AL. Sup. Ct. Hawaii. Certiorari denied. Reported below: 53 Haw. 132 and 177, 488 P. 2d 703.

No. 71–1204. FRASER & JOHNSTON CO. *v.* LODGE 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 88.

No. 71–1211. SAPENTER ET UX. *v.* DREYCO, INC. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 941.

No. 71–1234. KENNEDY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 1023.

No. 71–1238. KLAES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1375.

No. 71–1239. BARDEN *v.* JUNIOR COLLEGE DISTRICT No. 520 OF ILLINOIS ET AL. App. Ct. Ill. 3d Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 1038, 271 N. E. 2d 680.

No. 71–1243. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. *v.* LEIGHTON. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 389.

No. 71–1256. PUGH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 909, 279 N. E. 2d 604.

No. 71–1278. CHEVRON OIL CO., CALIFORNIA COMPANY DIVISION *v.* ROYAL INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 580.

No. 71–1283. METROPOLITAN SEWERAGE COMMISSION OF COUNTY OF MILWAUKEE *v.* FATTORE CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 537.

No. 71–1320. HANRAHAN ET AL. *v.* SEARS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 51, 277 N. E. 2d 705.

No. 71–5572. CONNER *v.* WINGO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–5830. JONES *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–5858. GRINDSTAFF *v.* MISSOURI ET AL. Sup. Ct. Mo. Certiorari denied.

No. 71–5886. GILREATH *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 107 Ariz. 318, 487 P. 2d 385.

No. 71–5899. WHITE *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 447 F. 2d 1354.

No. 71–5914. SYKES *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–5920. DURLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 132 Ill. App. 2d 570, 270 N. E. 2d 170.

No. 71–5937. BOWRING *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 71–5938. BARONE *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 484.

No. 71–6146. TASBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 451 F. 2d 394.

No. 71–6163. AUGELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 1135.

No. 71–6165. HIGGINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6166. PETERKIN ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 281 A. 2d 567.

No. 71–6168. CASTANON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 932.

No. 71–6170. SOOTS ET UX. *v.* PANARO. Sup. Ct. Del. Certiorari denied.

No. 71–6171. PIZZO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 453 F. 2d 1063.

No. 71–6172. MALONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 F. 2d 344.

No. 71–6173. COLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 902.

No. 71–6175. BEYER *v.* UNITED STATES. C. A. 3d 3d Cir. Certiorari denied. Reported below: 453 F. 2d 248.

No. 71–6174. KRESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 576.

No. 71–6177. ALLEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1371.

No. 71–6178. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 453 F. 2d 634.

No. 71–6179. MCCLELLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6180. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 451 F. 2d 351.

No. 71–6181. NACI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 1144.

No. 71–6184. ATKINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 835.

No. 71–6187. BAUGHMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 450 F. 2d 1217.

No. 71–6188. LEWIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–6191. RAY *v.* BRIERLEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 71–6192. REDDING *v.* BOARD OF COUNTY COMMISSIONERS OF PRINCE GEORGE'S COUNTY. Ct. App. Md. Certiorari denied. Reported below: 263 Md. 94, 282 A. 2d 136.

No. 71–6194. BATEN *v.* DISTRICT UNEMPLOYMENT COMPENSATION BOARD. Ct. App. D. C. Certiorari denied.

No. 71–6195. HAYES *v.* CADY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–6198. OLBROT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 49 Ill. 2d 216, 274 N. E. 2d 73.

No. 71–6199. MCDANIEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6200. AVILA-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1364.

No. 71–6201. WOLFSON ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 454 F. 2d 60.

No. 71–6202. ARMSTRONG *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 71–6203. TOMLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 176.

No. 71–6205. POKRAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6206. KENNEDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 1089.

No. 71–6207. BARAN *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6208. MCWILLIAMS *v.* UNITED STATES; and No. 71–6217. BERKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 71–6212. STRAUSS ET AL. *v.* DADE COUNTY. Sup. Ct. Fla. Certiorari denied. Reported below: 253 So. 2d 864.

No. 71–6211. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 450 F. 2d 339.

No. 71–6213. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6214. GARNER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 71–6215. HOWELLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 452 F. 2d 1182.

No. 71–6216. MOORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 453 F. 2d 601.

No. 71–6218. FRAME *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 1136.

No. 71–6220. BURKE *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 563.

No. 71–6221. ETHRIDGE *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 71–6222. ADAMS ET UX. *v.* AKRON METROPOLITAN HOUSING AUTHORITY. Sup. Ct. Ohio. Certiorari denied.

No. 71–6228. HAMILTON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 452 F. 2d 472.

No. 71–6229. STEWART *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 185.

No. 71–6230. LINDSEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 453 F. 2d 867.

No. 71–6231. HEIGL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 455 F. 2d 1256.

No. 71–6233. ALLERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 1244.

No. 71–6234. RYLES, AKA PETERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 F. 2d 190.

No. 71–6240. THACKER *v.* BRASWELL, JUDGE, ET AL. Sup. Ct. N. C. Certiorari denied.

No. 71–6244. RICE *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 71–6245. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 455 F. 2d 863.

No. 71–6246. JOHNSON *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 71–6248. BUCKLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 594.

No. 71–6249. KRIKMANIS *v.* MANNERING ET AL. C. A. 1st Cir. Certiorari denied.

No. 71–6250. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–6253. LISK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 454 F. 2d 205.

No. 71–6254. SWEENEY *v.* FRITZ, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 71–6257. OWINGS *v.* SECRETARY OF THE AIR FORCE. C. A. D. C. Cir. Certiorari denied. Reported below: 145 U. S. App. D. C. 76, 447 F. 2d 1245.

No. 71–6266. TAYLOR *v.* SMITH, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 751.

No. 71–6267. DOWDLE *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 71–6268. LEACH *v.* UNITED STATES; and
No. 71–6275. LEACH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 612.

No. 71–6276. CUMMINGS *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 455 F. 2d 714.

No. 71–6277. RASKIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6283. HALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 F. 2d 492.

No. 71–6290. WILLIAMS *v.* DEEGAN, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6293. REAVES *v.* BLACKLEDGE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6294. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 1314.

No. 71–6300. MORRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 561.

No. 71–6306. WEATHERS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 208 Kan. 653, 493 P. 2d 270.

No. 71–6312. THACKER *v.* SLAYTON, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied.

No. 71–6310. EVANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 71–6317. FINE *v.* KOLODNY ET AL. Ct. App. Md. Certiorari denied. Reported below: 263 Md. 647, 284 A. 2d 409.

No. 71–6318. SUMPTER *v.* WHITE PLAINS HOUSING AUTHORITY ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 29 N. Y. 2d 420, 278 N. E. 2d 892.

No. 71–6322. SCHMEIDEBERG *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 71–6323. SHERIS *v.* THOMPSON ET AL. Sup. Ct. N. H. Certiorari denied.

No. 71–6324. DELEVAY *v.* GREYHOUND CORP. Ct. App. D. C. Certiorari denied.

No. 71–6331. WHITE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 71–6333. FERENC *v.* JOHNSON, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–6335. FAIR *v.* TAMPA ELECTRIC CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 71–6338. SHUTT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 279 N. C. 689, 185 S. E. 2d 206.

No. 71–6343. CASH *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–6348. BROWN *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6351. BLANCO *v.* RKO THEATRES, INC., DBA RKO GREENPOINT. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 151.

No. 71–6352. GREENE *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: — S. D. —, 192 N. W. 2d 712.

No. 71–6357. ODEN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 71–6358. SAPP *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 476 S. W. 2d 321.

No. 71–942. OZZANTO ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1048. LONDON *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, DIVISION OF FAMILY SERVICES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 448 F. 2d 655.

No. 71–1056. MECHANIC ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 454 F. 2d 849.

No. 71–1060. TSAKALOTOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1103. HONCHOK ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–1149. CREEK NATION *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 196 Ct. Cl. 639.

No. 71–1160. TRANSPORT OF NEW JERSEY *v.* DELAWARE RIVER PORT AUTHORITY. Sup. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 59 N. J. 531, 284 A. 2d 529.

No. 71–1165. HARPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 458 F. 2d 891.

No. 71–1207. BAYLESS ET AL. *v.* MARTINE ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 561.

No. 71–1223. CALDERONE ENTERPRISES CORP. *v.* UNITED ARTISTS THEATRE CIRCUIT, INC., ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 454 F. 2d 1292.

No. 71–5099. NORWOOD *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 440 F. 2d 1073.

No. 71–5789. ANDERSON *v.* KENTUCKY. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5854. STANLEY ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5855. MEALEY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5860. PINO ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5896. TENNANT *v.* OHIO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5947. ERENYI *v.* FITZHARRIS, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5960. BROWN *v.* SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 435 F. 2d 1352.

No. 71–6225. DOSTAL ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 28 Ohio St. 2d 158, 277 N. E. 2d 211.

No. 71–6227. MAYFIELD *v.* UNITED STATES; and
No. 71–6236. WHITLOCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6239. JOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 653.

No. 71–6280. ROSENTHAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 454 F. 2d 1252.

No. 71–6363. CAROLINE *v.* REICHER ET AL. Ct. App. Md. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6288. INGRAM *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6289. LESLIE ET AL. *v.* MATZKIN, JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 310.

No. 71–6365. GRUMBLES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 119.

No. 71–6366. DUFF *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 1009.

No. 71–943. WHITAKER *v.* NEW YORK ET AL. Ct. App. N. Y. Motion to dispense with printing petition granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–966. DOHERTY *v.* DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION BOARD. Ct. App. D. C. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 283 A. 2d 206.

No. 71–1125. DELAUGHTER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 453 F. 2d 908.

No. 71–1130. CARGILL, INC., ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 452 F. 2d 1154.

No. 71–1213. DESAPIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 456 F. 2d 644.

No. 71–1174. UNITED TRANSPORTATION UNION *v.* GEORGIA RAILROAD. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 452 F. 2d 226.

No. 71–6235. TELEPHONE USERS ASSOCIATION, INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 71–6271. TELEPHONE USERS ASSOCIATION, INC. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 71–1198. TEXAS HIGHWAY DEPARTMENT ET AL. *v.* NAMED INDIVIDUALS. C. A. 5th Cir. Motions of Citizens Committee for Completion of the North Expressway et al. and Greater San Antonio Chamber of Commerce for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: See 446 F. 2d 1013.

No. 71–1317. SCHOOL BOARD OF THE CITY OF NORFOLK, VIRGINIA, ET AL. *v.* BREWER ET AL. C. A. 4th Cir. Motion of respondents to vacate stay of mandate of the United States Court of Appeals for the Fourth Circuit granted. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and petition. Reported below: 456 F. 2d 943.

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No. 71–1110. VESTAL ET AL. *v.* HOFFA ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 451 F. 2d 706.

No. 71–5910. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL are of the opinion that certiorari should be granted. Reported below: 449 F. 2d 679.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner was convicted of bank robbery after a trial in which the Government introduced over objection tape recordings of his telephone communications. These tape recordings had resulted from a federal court order which was issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, and which permitted federal agents to wiretap. Although the order was limited to seizures of communications relating to narcotics offenses, the eavesdroppers discovered that the subjects were discussing a bank robbery and those conversations were recorded despite the limited scope of the order.

The petitioner challenged the introduction of these tapes on the ground that their subject matter was outside the scope of the warrant. The Court of Appeals rejected this argument, reasoning that once the device was legitimately spliced into the designated telephone lines anything overheard was in "plain view" and therefore could be seized lawfully. Said the Court of Appeals: "Once the listening commences it becomes impossible to turn it off when a subject other than one which is authorized is overheard," 449 F. 2d 679, 686–687. With all respect, that is precisely the point. As I said in *Osborn* v. *United States*, 385 U. S. 323, 353:

> "Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope,

> without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit."

I would grant this petition, reverse, and hold that Title III offends the Warrant Clause of the Fourth Amendment.

No. 71–6125. ROACH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1054.

MR. JUSTICE DOUGLAS, dissenting.

I would grant the petition for a writ of certiorari and either reverse out of hand or put the case down for argument.

By a 1903 treaty the United States obtained a corridor across the Republic of Panama from the Caribbean to the Pacific. 33 Stat. 2234. But Art. VI of the treaty provided that the grants to the United States shall not "interfere with the rights of way over the public roads passing through the said zone . . . unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case the rights of the United States shall be superior." 33 Stat. 2235; 3 Canal Zone Code 431.

Petitioner is a Panamanian who has been operating buses in Panama for 23 years. His license to operate was granted by the Republic of Panama and his area of operation begins and ends in the Republic of Panama. Under a reciprocal agreement between the Canal Zone and Panama any motor vehicle inspected in Panama will be accepted in the Canal Zone and *vice versa*.

The public road traveled by petitioner crosses the Canal Zone, and his operations in no way conflict with any rights "granted to the United States" under the 1903 treaty.

The Canal Zone authorities decided to give all cross-Canal Zone public transportation to one Delaware corporation. The necessity of the Delaware corporation's meeting minimum wage requirements was said to be the reason. No hearings, however, were held. The petitioner and the other "indigents" were given no notice and no opportunity to be heard. They were driven out of business by the *ipse dixit* of the Governor and petitioner stands criminally convicted. Petitioner is no fly-by-night operator. He operated 15 buses and employed 30 people and was in this business for 23 years. His crossing of the Canal Zone is guaranteed by the 1903 treaty; and though one agrees, *arguendo,* that the right may be regulated as to times and circumstances, there is no defensible reason given why a person should be driven out of business with no chance to be heard.

The Canal Zone has a Bill of Rights, much of it taken almost word for word from our first Eight Amendments. 1 Canal Zone Code, Tit. 1, c. 3, § 31. One guarantee is that "[a] person may not be . . . deprived of life, liberty, or property without due process of law." § 31 (5)(C). We enacted such a Bill of Rights for the Philippines and when it came for review here this Court said:

> "When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the President

declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.

"How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?" *Kepner* v. *United States,* 195 U. S. 100, 124.

That is the approach we should take here.

Procedural due process, for example, may not be necessary before food unfit for human use is seized. See *North American Storage Co.* v. *Chicago,* 211 U. S. 306. But barring the need for quick, expeditious action, the amenities of notice and hearing are required whether discharge from public employment be at issue, *Slochower* v. *Board of Education,* 350 U. S. 551; denial of a tax exemption, *Speiser* v. *Randall,* 357 U. S. 513; disqualification for unemployment compensation, *Sherbert* v. *Verner,* 374 U. S. 398; or the termination of welfare benefits, *Goldberg* v. *Kelly,* 397 U. S. 254, 263–265.

The honor of this Nation, as well as the livelihood of this petitioner, is at stake here. We grant Panamanians a Bill of Rights and dishonor it. The imperialistic, colonial attitude of our administration in the Canal Zone is notorious. But the "natives" are entitled to the same due process which we grant our own citizens.

I see no reason why we should not reverse this judgment out of hand. The least we can do is to set the case for argument.

No. 71–6176. MAFFEI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 450 F. 2d 928.

MR. JUSTICE DOUGLAS, dissenting.

Seven courts of appeals, including the court below, have held that a federal defendant who presents evidence in his behalf thereby waives any error in a prior denial of a motion for acquittal made at the close of the Government's case. *United States* v. *Haskell,* 327 F. 2d 281, 282, n. 2 (CA2); *United States* v. *Feldman,* 425 F. 2d 688, 692 (CA3); *United States* v. *Cashio,* 420 F. 2d 1132, 1134 (CA5); *United States* v. *Carabbia,* 381 F. 2d 133, 138 (CA6); *Cline* v. *United States,* 395 F. 2d 138, 144 (CA8); *Viramontes-Medina* v. *United States,* 411 F. 2d 981, 982 (CA9); *United States* v. *Greene,* 442 F. 2d 1285, 1286–1287, n. 3 (CA10). Two other courts of appeals, however, have held that presentation of a defense is not a waiver. *United States* v. *Rizzo,* 416 F. 2d 734, 736 n. 3 (CA7); *Cephus* v. *United States,* 117 U. S. App. D. C. 15, 324 F. 2d 893. I would grant this petition to resolve the conflict. Rule 19 (1)(b) of the Rules of this Court.

Rehearing Denied

No. 71–5773. FAIR *v.* WIGGINS, 405 U. S. 971;

No. 71–5850. GRAHAM *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. (AEROJET-GENERAL CORP. ET AL., REAL PARTIES IN INTEREST), 405 U. S. 993;

No. 71–5853. TIMMONS *v.* PENNSYLVANIA ET AL., 405 U. S. 993;

No. 71–5877. SMART *v.* UNITED STATES, 405 U. S. 998;

No. 71–5888. BAXTER *v.* DAVIS ET AL., 405 U. S. 999; and

No. 71–5889. DENMAN ET AL. *v.* SCANNELL ET AL., 405 U. S. 994. Petitions for rehearing denied.

No. 71–5902. OLIVER *v.* DUGGAN, DISTRICT ATTORNEY OF ALLEGHENY COUNTY, ET AL., 405 U. S. 995;

No. 71–5905. CRUZ *v.* BETO, CORRECTIONS DIRECTOR, 405 U. S. 998;

No. 71–5912. WILLIAMSON ET AL. *v.* UNITED STATES, 405 U. S. 1026;

No. 71–5944. KYLE *v.* UNITED STATES, 405 U. S. 1018;

No. 71–6000. DUNLEAVAY *v.* ROCKEFELLER CENTER, INC., ET AL., 405 U. S. 1044; and

No. 71–6005. EVANS *v.* UNITED STATES, 405 U. S. 1045. Petitions for rehearing denied.

No. 71–563. ROHRBAUGH ET AL. *v.* PRESBYTERY OF SEATTLE, INC., ET AL., 405 U. S. 996. Petition for rehearing denied. MR. JUSTICE POWELL is of the opinion that rehearing should be granted.

MAY 16, 1972

Dismissal Under Rule 60

No. 70–5002. BUTLER *v.* ALABAMA. Sup. Ct. Ala. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 285 Ala. 387, 232 So. 2d 631.

MAY 22, 1972

Affirmed on Appeal

No. 71–1264. FERRELL ET AL. *v.* HALL, GOVERNOR OF OKLAHOMA, ET AL. Affirmed on appeal from D. C. W. D. Okla. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted. Reported below: 339 F. Supp. 73.

Appeals Dismissed

No. 71–1068. MIDWEST FREIGHT FORWARDING CO., INC., ET AL. *v.* LEWIS, SECRETARY OF STATE OF ILLINOIS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 49 Ill. 2d 441, 275 N. E. 2d 388.

No. 71–5998. HAYES *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 6 Cal. 3d 216, 490 P. 2d 1137.

Vacated and Remanded on Appeal

No. 71–1142. UNITED STATES *v.* HARPER. Appeal from D. C. Mass. Motion to dispense with printing motion to affirm granted. Judgment vacated and case remanded with directions to dismiss proceedings as moot. Reported below: 335 F. Supp. 904.

Certiorari Granted—Vacated and Remanded

No. 71–589. RANCH-WAY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Burns International Security Services, Inc., ante,* p. 272. Reported below: 445 F. 2d 625.

Miscellaneous Orders

No. 31, Orig. UTAH *v.* UNITED STATES. [For decree, see *ante,* p. 484.]

IT IS ORDERED that Honorable Charles Fahy, Senior Judge of the United States Court of Appeals for the District of Columbia Circuit, be, and he is hereby, appointed Special Master in this case in place of Honorable J. Cullen Ganey, deceased. The Special Master shall have authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The

allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

No. 36, Orig. TEXAS *v.* LOUISIANA. Report of Special Master received and ordered filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days. [For earlier orders herein, see, *e. g.*, 398 U. S. 934.]

No. 55, Orig. WEBB *v.* PORTER. Motion for leave to file bill of complaint denied.

No. 71–237. MANCUSI, CORRECTIONAL SUPERINTENDENT *v.* STUBBS. [Certiorari granted, 404 U. S. 1014.] Motions of respondent for appointment of counsel and for leave to proceed *in forma pauperis* granted.

No. 71–257. GRUBBS, DBA T. R. GRUBBS TIRE & APPLIANCE *v.* GENERAL ELECTRIC CREDIT CORP., 405 U. S. 699. Motion of petitioner for a determination of cause on the merits denied.

No. 71–507. KEYES ET AL. *v.* SCHOOL DISTRICT No. 1, DENVER, COLORADO, ET AL. C. A. 10th Cir. [Certiorari granted, 404 U. S. 1036.] Motions of Anti-Defamation League of B'nai B'rith et al., National Education Assn. et al., and Mexican American Legal Defense & Educational Fund for leave to file briefs as *amici curiae* granted. MR. JUSTICE WHITE took no part in the consideration or decision of these motions.

No. 71–685. LEHNHAUSEN, DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS *v.* LAKE SHORE AUTO PARTS CO. ET AL.; and

No. 71–691. BARRETT, COUNTY CLERK OF COOK COUNTY, ILLINOIS, ET AL. *v.* SHAPIRO ET AL. Sup. Ct. Ill. [Certiorari granted, 405 U. S. 1039.] Motion of Lake Shore Auto Parts Co. for leave to withdraw as a party respondent in No. 71–685 denied. Motion for order requiring petitioners to recognize "Maynard Respondents" as parties to the litigation denied without prejudice to seeking leave to appear as *amici curiae*.

No. 71–703. UNITED STATES *v.* FIRST NATIONAL BANCORPORATION, INC., ET AL. Appeal from D. C. Colo. [Probable jurisdiction noted, 405 U. S. 915.] Motion of New York State Banking Department for leave to file a brief as *amicus curiae* granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 71–732. SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT *v.* BUSTAMONTE. C. A. 9th Cir. [Certiorari granted, 405 U. S. 953.] Motion of respondent for additional time for oral argument denied. However, permission granted for two counsel to argue on behalf of respondent.

No. 71–900. UNION OIL COMPANY OF CALIFORNIA *v.* THE SAN JACINTO ET AL. C. A. 9th Cir. [Certiorari granted, 405 U. S. 954.] Motion to dispense with printing appendix and to proceed on original record denied.

No. 71–1476. GAFFNEY *v.* CUMMINGS ET AL. Appeal from D. C. Conn. Motion of appellant to expedite consideration denied. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join in denying expedited consideration on the merits but would invite appellant to file an appropriate motion for stay. Reported below: 341 F. Supp. 139.

No. 71–1263. KAHN ET UX. *v.* ARIZONA STATE TAX COMMISSION. Appeal from Ct. App. Ariz. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 16 Ariz. App. 17, 490 P. 2d 846.

No. 71–1443. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES ET AL. *v.* CROW ET AL. Petition for certiorari before judgment to C. A. 9th Cir. Motion of petitioners to expedite consideration and for consolidation with No. 71–1119 [*Indiana Employment Security Division* v. *Burney*, appeal from D. C. N. D. Ind.] denied.

No. 71–5861. MOORE *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 71–5876. PARKER *v.* NELSON, WARDEN; and

No. 71–6374. SMITH *v.* NELSON, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 71–6384. BIVENS *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

No. 71–1170. WHDH, INC. *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Motion for leave to file petition for writ of mandamus denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 71–1470. LEMON ET AL. *v.* KURTZMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF PENNSYLVANIA, ET AL. Appeal from D. C. E. D. Pa. Application for extension of injunction, presented to MR. JUSTICE BRENNAN and by him referred to the Court, granted. Probable jurisdiction noted. Motion to expedite denied. Reported below: 348 F. Supp. 300.

No. 71–991. OTTER TAIL POWER CO. *v.* UNITED STATES. Appeal from D. C. Minn. Probable jurisdiction noted. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this matter. Reported below: 331 F. Supp. 54.

Certiorari Granted

No. 71–1133. UPPER PECOS ASSN. *v.* PETERSON, SECRETARY OF COMMERCE, ET AL. C. A. 10th Cir. Certiorari granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 452 F. 2d 1233.

No. 71–6278. ALMEIDA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 452 F. 2d 459.

Certiorari Denied. (See also No. 71–5998, *supra.*)

No. 71–928. BASKETT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 71–1141. NEW YORK *v.* PENN CENTRAL TRANSPORTATION CO.; and

No. 71–1229. NEW JERSEY *v.* PENN CENTRAL TRANSPORTATION CO. C. A. 3d Cir. Certiorari denied. Reported below: 452 F. 2d 1107.

No. 71–1150. PATENTS MANAGEMENT CORP. ET AL. *v.* TRUSTEES OF THE PENN CENTRAL TRANSPORTATION CO. C. A. 3d Cir. Certiorari denied. Reported below: 454 F. 2d 710.

No. 71–1151. WARREN *v.* UNITED STATES. C. A 2d Cir. Certiorari denied. Reported below: 453 F. 2d 738.

No. 71–1157. SHEWFELT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 836.

No. 71–1158. CROW ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 453 F. 2d 1328.

No. 71–1159. LOCOCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 450 F. 2d 1196.

No. 71–1177. BAILEY ET AL. *v.* DIXON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 451 F. 2d 160.

No. 71–1184. WISNIEWSKI *v.* UNITED STATES; and
No. 71–6485. TRAVISANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 456 F. 2d 9.

No. 71–1187. MARCHESE *v.* MCEACHEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 451 F. 2d 555.

No. 71–1216. BIG "D" DEVELOPMENT CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1365.

No. 71–1237. GALLINARO ET AL. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 277 N. E. 2d 527.

No. 71–1242. NAKAI ET AL. *v.* HAMILTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 152.

No. 71–1244. KING, TRUSTEE *v.* CITY OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: —— Ill. App. 2d ——, 273 N. E. 2d 712.

No. 71–1249. BOARD OF COMMISSIONERS OF THE CITY OF JACKSON ET AL. *v.* MONROE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 259.

No. 71–1250. NOONAN *v.* MIDLAND CAPITAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 453 F. 2d 459.

No. 71–1247. NIX *v.* GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 794.

No. 71–1269. UNGAR ET AL. *v.* LEFF, JUSTICE, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 71–1282. GIANONE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 71–1328. LANGHORNE *v.* LANGHORNE ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 212 Va. 577, 186 S. E. 2d 50.

No. 71–5966. MITCHELL *v.* ALLEN, SHERIFF. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 185 S. E. 2d 355.

No. 71–5985. KANTER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 253 So. 2d 509.

No. 71–5992. PICKETT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 71–6034. SINIBALDI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 37 App. Div. 2d 921, 325 N. Y. S. 2d 738.

No. 71–6056. GIBSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 750.

No. 71–6119. REAGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 165.

No. 71–6182. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 454 F. 2d 286.

No. 71–6197. TRAMEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 71–6279. MUNGIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 734.

No. 71–6292. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 455 F. 2d 991.

No. 71–6296. EPPERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 454 F. 2d 769.

No. 71–6297. RHODEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 598.

No. 71–6303. ZEMKE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 110.

No. 71–6304. VILHOTTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 F. 2d 1186.

No. 71–6308. FERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6327. COLEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 1374.

No. 71–6332. HAMILTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 171.

No. 71–6339. MORAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1066.

No. 71–6375. LALWANI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 71–6376. BUSH *v.* FOSTER ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–6378. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 800.

No. 71–6379. LUNDBERG *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 71–6381. CAMPBELL *v.* GEORGIA. C. A. 5th Cir. Certiorari denied.

No. 71–6386. MELILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6388. ROPER *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 499.

No. 71–6389. SHINDLER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 219 Pa. Super. 376, 281 A. 2d 745.

No. 71–6395. DELANY *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 475 S. W. 2d 102.

No. 71–6397. RIVERA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–6400. NASH *v.* AMERADA HESS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 799.

No. 71–1146. POETA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 117.

No. 71–6409. HAINING *v.* ROBERTS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1223.

No. 71–1147. FORD MOTOR CO. *v.* ELLIPSE CORP. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 163.

No. 71–6405. BROZ *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: —— Tenn. App. ——, 472 S. W. 2d 907.

No. 71–913. SEABOARD SHIPPING CORP. *v.* MORAN INLAND WATERWAYS CORP. ET AL.; and

No. 71–981. MORAN INLAND WATERWAYS CORP. ET AL. *v.* SEABOARD SHIPPING CORP. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be granted. Reported below: 449 F. 2d 132.

No. 71–1267. COENEN *v.* R. W. PRESSPRICH & CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 1209.

No. 71–5930. ROSS *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5962. GELLERS *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 282 A. 2d 173.

No. 71–6070. LOFTON *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 489 P. 2d 1169.

No. 71–6398. LUCAS *v.* TEXAS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 390.

No. 71–6399. COTA *v.* EYMAN, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 691.

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No. 71–1167. PICARD, CORRECTIONAL SUPERINTENDENT *v.* EISEN. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 452 F. 2d 860.

No. 71–1173. FOLLETTE, CORRECTIONAL SUPERINTENDENT *v.* BURGOS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 448 F. 2d 130.

No. 71–1171. WHDH, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. THE CHIEF JUSTICE took to part in the consideration or decision of this petition. Reported below: 149 U. S. App. D. C. 322, 463 F. 2d 268.

No. 71–1265. GALLAGHER ET AL. *v.* CARTER ET AL. C. A. 8th Cir. Motion of International Association of Fire Fighters for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 452 F. 2d 315.

Rehearing Denied

No. 70–5197. SWEENEY *v.* SHERIDAN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL., 404 U. S. 839, 962; and

No. 71–5817. BURNS *v.* COLUMBIA PICTURES INTERNATIONAL CORP. ET AL., 405 U. S. 991, *ante*, p. 911. Motions for leave to file second petitions for rehearing denied.

No. 71–1007. REGENCY REALTY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 405 U. S. 1065;

No. 71–1077. ELLIS, TRUSTEE *v.* POWERS ET AL., 405 U. S. 1075; and

No. 71–6065. BYLAND *v.* CRAVEN, WARDEN, 405 U. S. 1070. Petitions for rehearing denied.

No. 71–5783. PATTERSON *v.* TULSA LOCAL No. 513, MOTION PICTURE OPERATORS OF THE UNITED STATES & CANADA, 405 U. S. 976; and

No. 71–5975. SAVAGE *v.* UNITED STATES ET AL., 405 U. S. 1043. Motions for leave to file petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit during the period beginning June 5, 1972, and ending June 9, 1972, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MAY 30, 1972

Dismissal Under Rule 60

No. 71–1300. DISTRICT COURT OF OKLAHOMA COUNTY, PROBATE DIVISION, ET AL. *v.* WASHINGTON & LEE UNIVERSITY ET AL. Sup. Ct. Okla. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 492 P. 2d 320.

Affirmed on Appeal

No. 71–1276. BIKLEN *v.* BOARD OF EDUCATION, CITY SCHOOL DISTRICT, SYRACUSE, ET AL. Affirmed on appeal from D. C. N. D. N. Y. MR. JUSTICE DOUGLAS would note jurisdiction and reverse. *Board of Education* v. *Barnette,* 319 U. S. 624. Reported below: 333 F. Supp. 902.

No. 71–1289. NON-RESIDENT TAXPAYERS ASSN. ET AL. *v.* PHILADELPHIA ET AL. Affirmed on appeal from D. C. N. J. Reported below: 341 F. Supp. 1135.

Appeals Dismissed

No. 70–84. CATENA *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Appeal from Super. Ct. N. J. dismissed for want of a substantial federal question. MR. JUSTICE DOUGLAS would note jurisdiction and reverse.

No. 71–318. ANNALORO *v.* NEW JERSEY STATE COMMISSION OF INVESTIGATION. Appeal from Sup. Ct. N. J. Appeal dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note jurisdiction and reverse. Reported below: 58 N. J. 387, 277 A. 2d 880.

No. 71–1107. GEE *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of substantial federal question.

No. 71–6341. DIGGS *v.* UNITED STATES. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed

No. 70–303. UNITED STATES *v.* KORMAN ET AL. C. A. 7th Cir. Certiorari granted and judgment reversed. *Kastigar* v. *United States, ante,* p. 441. Reported below: 449 F. 2d 32.

No. 71–775. UNITED STATES *v.* CROPPER. C. A. 5th Cir. Certiorari granted and judgment reversed. *Kastigar* v. *United States, ante,* p. 441. Reported below: 454 F. 2d 215.

No. 71–377. ELIAS, CORRECTIONAL SUPERINTENDENT *v.* CATENA. C. A. 3d Cir. Certiorari granted and judgment reversed. *Zicarelli* v. *New Jersey State Commission of Investigation, ante,* p. 472. MR. JUSTICE DOUGLAS dissents. Reported below: 449 F. 2d 40.

*Certiorari Granted—Vacated and Remanded**

No. 71-6274. McGarva *v.* United States. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of position presently asserted by the Government. The Chief Justice, Mr. Justice Powell, and Mr. Justice Rehnquist would deny certiorari. Reported below: 453 F. 2d 918.

Mr. Justice Douglas, whom Mr. Justice Brennan joins.

This case involves a Selective Service registrant whose local board denied him a conscientious objector exemption. In order to secure aid for his appeal, the registrant met with a Government appeals agent. The agent made out a report which was placed in the registrant's file, and which was before the appeal board when it considered petitioner's claim. The report was unfavorable, and the Solicitor General so concedes. The Solicitor General also concedes that because of the appeal agent's special position in the Selective Service System, his views probably carried substantial weight with the appeal board. Yet, this crucial report was not shown to the registrant, so that he might have attempted to rebut the unfavorable statements contained therein.

It is clear from the decisions of this Court over the past two decades that the failure to show this report to the registrant was a violation of the statutory mandate that the "system of selection" be "fair and just." 50 U. S. C. App. § 451 (c).

Thus, this Court has held that where provisions were

*[Reporter's Note: The orders of May 30, 1972, granting the petitions for certiorari, vacating the judgments, and remanding the cases to the respective lower courts in Nos. 70-303, 71-377, and 71-775, *infra*, were revoked on the same date.]

made in the Act for FBI reports on claimants for conscientious objector exemptions,

> "in accordance with the statutory plan and the concepts of basic fairness which underlie all our legislation . . . the Department must furnish the registrant with a fair résumé of the FBI report." *Simmons* v. *United States*, 348 U. S. 397, 405.

And, when the Act contemplated that the Department of Justice should recommend to a registrant's appeal board whether a conscientious objector exemption should be granted or denied, this Court held that

> "the over-all procedures set up in the statute and regulations, designed to be 'fair and just' in their operation, 62 Stat. 605, 50 U. S. C. App. § 451 (c), require that the registrant receive a copy of the Justice Department's recommendation and be given a reasonable opportunity to file a reply thereto." *Gonzales* v. *United States*, 348 U. S. 407, 417.

In 1967, the provisions relating to Justice Department hearings and recommendations were deleted from the Act. The statutory mandate of § 451 (c), however, remains unchanged. And, "viewed against our underlying concepts of procedural regularity and basic fair play," *id.*, at 412, the appellate procedures employed in this case cannot stand. "[I]t is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436.

The use of adverse information not disclosed to the registrant is exactly analogous to the FBI report summary not disclosed to the registrant in *Simmons*, and the Justice Department recommendation kept from the registrant in *Gonzales*. The failure to disclose the use of such material vitiates petitioner's statutory right of appeal. For no appeal procedure can be "fair" where only one side has had an opportunity to present its case.

Moreover, the very nature of the procedural error renders impossible the application of a "harmless error" test, and we so held in *Simmons*. Commenting on the effect of a finding that the petitioner therein had not been given a fair résumé of the adverse information in the FBI report, the Court explicitly stated:

> "This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, *and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation.*" 348 U. S., at 406. (Emphasis added.)

Unless we are to overrule these cases, which have found uniform acceptance by the lower courts (see, *e. g.*, *United States* v. *Thompson*, 431 F. 2d 1265, 1271; *United States* v. *Cabbage*, 430 F. 2d 1037, 1039–1041; *United States* v. *Cummins*, 425 F. 2d 646; *United States* v. *Owen*, 415 F. 2d 383, 388–389), we must accept the Solicitor General's confession of error and reverse the judgment below.

Miscellaneous Orders

No. A–926 (71–6522). SCHWARTZ *v.* UNITED STATES. Application for stay of execution of sentence for civil contempt presented to MR. JUSTICE MARSHALL, and by him referred to the Court, granted.

No. 71–718. MCGINNIS, CORRECTION COMMISSIONER, ET AL. *v.* ROYSTER ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 405 U. S. 986.] Motion for appointment of counsel granted. It is ordered that James J. McDonough, Esquire, and Matthew Muraskin, Esquire, of Mineola, New York, be, and they are hereby, appointed to serve as counsel for appellees in this case.

No. 71–1511. NORVELL, ATTORNEY GENERAL OF NEW MEXICO *v.* APODACA; and

No. 71–1512. BROWN ET AL. *v.* APODACA ET AL. Sup. Ct. N. M. Motions to expedite consideration denied. Reported below: 83 N. M. 663, 495 P. 2d 1379.

No. A–1235 (71–1531). NOLAN *v.* JUDICIAL COUNCIL OF THE THIRD CIRCUIT OF THE UNITED STATES ET AL. Application for stay presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 71–1291. CHANDLER, U. S. DISTRICT JUDGE *v.* BATTISTI, CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus and/or prohibition denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 71–1119. INDIANA EMPLOYMENT SECURITY DIVISION ET AL. *v.* BURNEY. Appeal from D. C. N. D. Ind. Probable jurisdiction noted. Reported below: 347 F. Supp. 218.

Certiorari Granted

No. 71–1178. GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 147 U. S. App. D. C. 98, 454 F. 2d 941.

No. 71–1192. GOLDSTEIN ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari granted.

No. 71–229. UNITED STATES *v.* DIONISIO; and

No. 71–850. UNITED STATES *v.* MARA, AKA MARASOVICH. C. A. 7th Cir. Certiorari granted and cases to be argued *in tandem*. Reported below: No. 71–229, 442 F. 2d 276; No. 71–850, 454 F. 2d 580.

No. 71–1371. ROSARIO ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Motion of Lawyers for McGovern for leave to file a brief as *amicus curiae* granted. Certiorari granted. Motion for summary reversal or, in the alternative, for expedited consideration on the merits denied. MR. JUSTICE STEWART would expedite consideration on the merits. Application for stay, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the stay. Reported below: 458 F. 2d 649.

No. 71–6042. WARDIUS *v.* OREGON. Sup. Ct. Ore. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: See 6 Ore. App. 391, 487 P. 2d 1380.

Certiorari Denied. (See also No. 71–6341, *supra.*)

No. 71–954. EPELDI ET AL. *v.* ENGELKING ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 94 Idaho 390, 488 P. 2d 860.

No. 71–1162. ROGERS ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 2d 234.

No. 71–1194. QUINN & Co., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 452 F. 2d 943.

No. 71–1195. GRIFFITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 1207.

No. 71–1202. BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA, AFL–CIO, LOCAL 130 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 457 F. 2d 500.

No. 71–1226. STRACHAN SHIPPING CO. ET AL. *v.* WEDEMEYER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 1225.

No. 71–1248. CALIFORNIA *v.* ANDERSON. Sup. Ct. Cal. Certiorari denied. Reported below: 6 Cal. 3d 628, 493 P. 2d 880.

No. 71–1294. ALPHONSE ET AL. *v.* W. M. KINNER TRANSPORT CO. ET AL.; and

No. 71–1303. ZWEIFEL ET AL. *v.* PHARRIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 700.

No. 71–1297. SPEARS ET UX. *v.* ASHE. Ct. App. Md. Certiorari denied. Reported below: 263 Md. 622, 284 A. 2d 207.

No. 71–1310. STA-RITE INDUSTRIES, INC. *v.* JOHNSON. C. A. 10th Cir. Certiorari denied. Reported below: 453 F. 2d 1192.

No. 71–1311. SCHWARTZ *v.* JEWISH HOSPITAL ASSOCIATION OF CINCINNATI. Sup. Ct. Ohio. Certiorari denied.

No. 71–1312. LAYNE ET AL. *v.* FLOYD COUNTY BOARD OF EDUCATION ET AL. Ct. App. Ky. Certiorari denied. Reported below: 474 S. W. 2d 397.

No. 71–1314. VIVAUDOU *v.* ROYAL NATIONAL BANK OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 71–5735. VAUGHN *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–5887. CRUZ *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 448 F. 2d 671.

No. 71–5932. MARTINEZ *v.* MISTERLY ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–5972. ESGATE *v.* ENGLISH, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 71–6017. GIORDANO *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 71–6037. ROBERTS *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 71–6043. MASCIA *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 450 F. 2d 166.

No. 71–6116. MORRIS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 259 La. 1001, 254 So. 2d 444.

No. 71–6153. BEVERLY *v.* QUATSOE. C. A. 7th Cir. Certiorari denied.

No. 71–6209. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 F. 2d 397.

No. 71–6237. THOMASON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 1094.

No. 71–6265. BARCHFELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6269. HARDIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 F. 2d 859.

No. 71–6273. DESIMONE *v.* UNITED STATES; and
No. 71–6307. CARUSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 554.

No. 71–6286. ANTHONY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 444 F. 2d 484.

No. 71–6319. PAYNE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 1201.

No. 71–6328. MILLS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 456 F. 2d 1111.

No. 71–6330. COGNATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–6334. POWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 453 F. 2d 885.

No. 71–6344. QUATTRUCCI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 454 F. 2d 58.

No. 71–6354. LAWTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 328.

No. 71–6359. MARNIN *v.* ZAMPELLA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 1097.

No. 71–6361. JONES ET AL. *v.* BIRD ET AL. C. A. 9th Cir. Certiorari denied.

No. 71–6369. BARNES *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 37 App. Div. 2d 918, 325 N. Y. S. 2d 638.

No. 71–6371. DEWINDT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–6373. MAYBURY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 453 F. 2d 1233.

No. 71–6382. BOAG *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 71–6383. DOLLAR *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 71–6385. WALLACE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 420.

No. 71–6402. GOODMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 457 F. 2d 68.

No. 71–6404. WATERS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 445 Pa. 534, 285 A. 2d 192.

No. 71–6406. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 454 F. 2d 255.

No. 71–6418. KRIKMANIS *v.* WHITE, MAYOR OF BOSTON, ET AL. C. A. 1st Cir. Certiorari denied.

No. 71–6419. BIVENS *v.* CHANCE. C. A. 2d Cir. Certiorari denied.

No. 71–6421. EDWARDS *v.* McCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 71–6424. APPLEGATE *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied.

No. 71–6429. MAGRO *v.* LENTINI BROS. MOVING & STORAGE CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 460 F. 2d 1064.

No. 69–6. UNIFORMED SANITATION MEN ASSN., INC., ET AL. *v.* COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 426 F. 2d 619.

No. 71–114. BOWDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 444 F. 2d 546.

No. 71–473. WEG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 450 F. 2d 340.

No. 71–1298. CAVALIERI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 29 N. Y. 2d 762, 276 N. E. 2d 624.

No. 71–5327. KEILLY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 445 F. 2d 1285.

No. 71–5795. PARK *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–5918. CHERRY *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 130 Ill. App. 2d 965, 267 N. E. 2d 744.

No. 71–5941. CARTER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: See 132 Ill. App. 2d 572, 270 N. E. 2d 603.

No. 71–6320. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 454 F. 2d 435.

No. 71–6353. KELLEY *v.* UNITED STATES; and
No. 71–6411. MACDONALD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 1259.

No. 71–1199. KIRK ET AL. *v.* UNITED STATES. C. A. 10th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 451 F. 2d 690.

No. 71–1288. WHITTINGTON *v.* GULF OIL CORP. ET AL. C. A. 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 453 F. 2d 892.

No. 71–1322. RIZZO, MAYOR OF PHILADELPHIA, ET AL. *v.* NORTH CITY AREA-WIDE COUNCIL, INC., ET AL. C. A. 3d Cir. Motion of respondent North City Area-Wide Council, Inc., for leave to dispense with printing brief granted. Certiorari denied. Reported below: 456 F. 2d 811.

No. 71–6106. VALENTINE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied, it appearing that the judgment rests upon an adequate state ground. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 259 La. 1019, 254 So. 2d 450.

Rehearing Denied

No. 71–1208. ROSE *v.* ROSE ET AL., *ante*, p. 907;

No. 71–5852. COOPERSMITH *v.* TOWN OF GRAND LAKE ET AL., *ante*, p. 907; and

No. 71–6123. STINSON *v.* EYMAN, WARDEN, *ante*, p. 907. Petitions for rehearing denied.

No. 71–605. HENRY ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL., 405 U. S. 1019. Motion to dispense with printing petition granted. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition.

No. 71–5164. FREEMAN *v.* PAGE, WARDEN, 404 U. S. 1001. Motion for leave to file petition for rehearing denied.

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Affirmed on Appeal

No. 71–1209. UNITED TRANSPORTATION UNION ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE DOUGLAS dissents from the affirmance. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 337 F. Supp. 410.

No. 71–5647. GOODWIN ET AL. *v.* WYMAN, COMMISSIONER OF NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL. Affirmed on appeal from D. C. S. D. N. Y. *Jefferson* v. *Hackney*, *ante*, p. 535. MR. JUSTICE DOUGLAS dissents from the affirmance. Reported below: 330 F. Supp. 1038.

Appeals Dismissed

No. 69–5041. BOUTTE *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 255 La. 605, 232 So. 2d 288.

No. 71–1070. KEEGAN *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–1104. NORTHERN NATURAL GAS CO. *v.* WILLIAMS, TREASURER OF RICE COUNTY, ET AL. Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 208 Kan. 407, 493 P. 2d 568; 208 Kan. 337, 492 P. 2d 147; and 208 Kan. 135, 490 P. 2d 399.

No. 71–1301. BREWSTER *v.* CHARLES ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 71–1321. HANRAHAN *v.* CALIENDO ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 50 Ill. 2d 72, 277 N. E. 2d 319.

No. 71–1339. REPUBLIC NATIONAL BANK OF DALLAS ET AL. *v.* RODRIGUEZ ET AL. Appeal from D. C. W. D. Tex. dismissed. Treating the jurisdictional statement in this case as a motion for leave to file a brief as *amici curiae* on behalf of appellants in No. 71–1332 [*San Antonio Independent School District* v. *Rodriguez*, probable jurisdiction noted, *infra*], motion granted.

Certiorari Granted—Vacated and Remanded

No. 71–982. HALL, SECRETARY OF HUMAN RELATIONS AGENCY, ET AL. *v.* VILLA ET AL. Sup. Ct. Cal. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Jefferson* v. *Hackney*, *ante*, p. 535. Reported below: 6 Cal. 3d 227, 490 P. 2d 1148.

Miscellaneous Orders

No. A–1151. DREER *v.* UNITED STATES. C. A. 3d Cir. Application for recall of mandate and reinstatement of bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 71–1193. UNITED STATES *v.* ENMONS ET AL. Appeal from D. C. E. D. La. [Probable jurisdiction noted, *ante*, p. 916.] Motion to dispense with printing appendix and to hear case on original record granted.

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No. 71–507. KEYES ET AL. *v.* SCHOOL DISTRICT No. 1, DENVER, COLORADO, ET AL. C. A. 10th Cir. [Certiorari granted, 404 U. S. 1036.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted. MR. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 71–1510. ROSS, ADMINISTRATIVE JUDGE, ET AL. *v.* RADICH. C. A. 2d Cir. Motion to expedite consideration of petition denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion. Reported below: 459 F. 2d 745.

No. 71–1513. RUSSO *v.* BYRNE, U. S. DISTRICT JUDGE. C. A. 9th Cir. Motion to expedite consideration of petition denied.

No. 71–6278. ALMEIDA-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, *ante*, p. 944.] Motion for appointment of counsel granted. It is ordered that James A. Chanoux, Esquire, of San Diego, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

Probable Jurisdiction Noted

No. 71–1336. IN RE GRIFFITHS. Appeal from Sup. Ct. Conn. Probable jurisdiction noted. Reported below: 162 Conn. 249, 294 A. 2d 281.

No. 71–1332. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT ET AL. *v.* RODRIGUEZ ET AL. Appeal from D. C. W. D. Tex. Motion of Wendell Anderson, Governor of Minnesota, et al. for leave to file a brief as *amici curiae* granted. Probable jurisdiction noted. Reported below: 337 F. Supp. 280.

Certiorari Denied. (See also Nos. 69–5041, 71–1070, 71–1104, and 71–1301, *supra.*)

No. 71–1105. NORTHERN NATURAL GAS CO. *v.* WILLIAMS, TREASURER OF RICE COUNTY, ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 208 Kan. 407, 493 P. 2d 568; 208 Kan. 337, 492 P. 2d 147; 208 Kan. 135, 490 P. 2d 399.

No. 71–1152. PANHANDLE EASTERN PIPE LINE CO. *v.* DWYER, DIRECTOR OF PROPERTY VALUATION OF KANSAS, ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 207 Kan. 417, 485 P. 2d 149, and 208 Kan. 304, 491 P. 2d 961.

No. 71–1205. RICUCCI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 71–1217. GOLDBERG, AKA GOULD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 455 F. 2d 479.

No. 71–1227. MASTROTATARO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 455 F. 2d 802.

No. 71–1232. LANDERMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 454 F. 2d 338.

No. 71–1286. TYLER INDEPENDENT SCHOOL DISTRICT ET AL. *v.* JUSTICE, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 71–1287. MILLS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 12 Md. App. 449, 279 A. 2d 473.

No. 71–1305. CARSON *v.* AMERICAN SAVINGS LIFE INSURANCE CO. C. A. 4th Cir. Certiorari denied.

No. 71–1319. IN RE SARELAS. Sup. Ct. Ill. Certiorari denied. Reported below: 50 Ill. 2d 87, 277 N. E. 2d 313.

No. 71–1323. GRIMES *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 71–1325. STIVERS *v.* KENTUCKY STATE BAR ASSN. Ct. App. Ky. Certiorari denied. Reported below: 475 S. W. 2d 900.

No. 71–1338. COMPTON ET AL. *v.* METAL PRODUCTS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 453 F. 2d 38.

No. 71–1342. ADAMS *v.* HARRIS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 452 F. 2d 994.

No. 71–1355. HESSMAN ET AL., DBA SANDY CROCKET DODGE *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 71–1356. VALLEY FORD SALES, INC., DBA FRIENDLY FORD *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied.

No. 71–5949. GRIMES *v.* MUNICIPAL COURT FOR THE CENTRAL DISTRICT OF ORANGE COUNTY. Sup. Ct. Cal. Certiorari denied. Reported below: 5 Cal. 3d 643, 488 P. 2d 169.

No. 71–5983. SHELTON *v.* JONES. C. A. 7th Cir. Certiorari denied.

No. 71–6097. MOORE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6109. NEGRON *v.* AGNEW, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 71–6117. PARKER *v.* SESSIONS ET AL. Sup. Ct. Fla. Certiorari denied.

No. 71–6139. ALLEN *v.* MOORE, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 453 F. 2d 970.

No. 71–6238. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 1 Ill. App. 3d 109, 273 N. E. 2d 535.

No. 71–6311. SPENCER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 71–6313. EVANS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 454 F. 2d 813.

No. 71–6346. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 71–6347. ELAM *v.* UNITED STATES; and
No. 71–6364. CRAPPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 1119.

No. 71–6377. CHILES ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 454 F. 2d 706.

No. 71–6403. GAST *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 457 F. 2d 141.

No. 71–6408. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 71–6410. YETO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 71–6432. APPLEGATE *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 71–6435. WARE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 147 U. S. App. D. C. 249, 455 F. 2d 1317.

No. 71–6434. SMITH *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 71–6439. FRAGOSO-GASTELLUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 1287.

No. 71–6440. MEADOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 456 F. 2d 197.

No. 71–6444. DEBORDE *v.* PINNOCK. Sup. Ct. Wash. Certiorari denied.

No. 71–6447. FOOTE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 71–6452. ECKERT *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 71–6453. GORDON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 455 F. 2d 398.

No. 71–6456. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 256 So. 2d 44.

No. 71–6463. ROY *v.* MANCHESTER GAS CO. C. A. 1st Cir. Certiorari denied.

No. 71–6469. BRYANT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 71–6470. JOHNSON *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 71–6471. CURTIS *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 71–6472. ALLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 988.

No. 71–6473. ZILKO *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 68–5007. ANDERSON ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 69 Cal. 2d 613, 447 P. 2d 117; 70 Cal. 2d 60, 447 P. 2d 913.

No. 68–5020. SMITH *v.* NELSON, WARDEN. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813.

No. 68–5021. REEVES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813.

No. 68–5025. MASSIE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813.

No. 68–5026. VARNUM *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 70 Cal. 2d 480, 450 P. 2d 553.

No. 68–5029. ROBINSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 70 Cal. 2d 171, 449 P. 2d 198.

No. 69–5002. TOLBERT *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 70 Cal. 2d 790, 452 P. 2d 661.

No. 69–5009. HILL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 70 Cal. 2d 678, 452 P. 2d 329.

No. 69–5012. PIKE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 71 Cal. 2d 595, 455 P. 2d 776.

No. 69–5019. MILLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 71 Cal. 2d 459, 455 P. 2d 377.

No. 69–5020. COOGLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 71 Cal. 2d 153, 454 P. 2d 686.

No. 69–5021. MABRY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 71 Cal. 2d 430, 455 P. 2d 759.

No. 69–5022. NYE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 71 Cal. 2d 356, 455 P. 2d 395.

No. 69–5026. ROBLES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 71 Cal. 2d 924, 458 P. 2d 67.

No. 69–5037. KING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 1 Cal. 3d 791, 463 P. 2d 753.

No. 69–5040. MILTON *v.* CALIFORNIA; and
No. 69–5042. FLOYD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *Aikens* v. *California, ante,* p. 813. Reported below: 1 Cal. 3d 694, 464 P. 2d 64.

No. 70–5007. WADE ET AL. *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 1 Ore. App. 480, 462 P. 2d 701; 1 Ore. App. 627, 464 P. 2d 721; 2 Ore. App. 265, 467 P. 2d 125; 2 Ore. App. 273, 467 P. 2d 122; 1 Ore. App. 624, 463 P. 2d 874; 2 Ore. App. 408, 467 P. 2d 973; 2 Ore. App. 149, 465 P. 2d 892; 2 Ore. App. 20, 465 P. 2d 251; 2 Ore. App. 212, 465 P. 2d 915; 2 Ore. App. 530, 469 P. 2d 37; 2 Ore. App. 446, 467 P. 2d 652; 2 Ore. App. 101, 465 P. 2d 251.

No. 70–5202. BLEVINS ET AL. *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: See 4 Ore. App. 234, 476 P. 2d 927; 5 Ore. App. 60, 481 P. 2d 381; 4 Ore. App. 526, 479 P. 2d 243; 5 Ore. App. 64, 480 P. 2d 730; 5 Ore. App. 63, 480 P. 2d 721; 4 Ore. App. 481, 478 P. 2d 644.

No. 70–5029. MARTINKA ET AL. *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 2 Ore. App. 499, 468 P. 2d 903; 3 Ore. App. 245, 471 P. 2d 862; 3 Ore. App. 36, 470 P. 2d 386; 3 Ore. App. 172, 469 P. 2d 792.

No. 70–5042. ANDREWS ET AL. *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 2 Ore. App. 595, 469 P. 2d 802; 3 Ore. App. 343, 472 P. 2d 829; 3 Ore. App. 308, 472 P. 2d 845.

No. 70–5063. PLANCK *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 3 Ore. App. 331, 473 P. 2d 694.

No. 70–5203. RIDDELL *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: See 4 Ore. App. 523, 479 P. 2d 254.

No. 71–5002. MITCHELL ET AL. *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 5 Ore. App. 230, 482 P. 2d 190; 5 Ore. App. 184, 482 P. 2d 192; 5 Ore. App. 259, 483 P. 2d 87.

No. 71–5581. ATKISON ET AL. *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: See 6 Ore. App. 68, 485 P. 2d 1117; 6 Ore. App. 204, 240, 486 P. 2d 581 (2 cases); 6 Ore. App. 189, 487 P. 2d 100; 6 Ore. App. 22, 485 P. 2d 446.

No. 71–6325. TEMPLE ET AL. *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: See 7 Ore. App. 91, 488 P. 2d 1380; 7 Ore. App. 268, 489 P. 2d 971; 7 Ore. App. 361, 489 P. 2d 1155; 7 Ore. App. 363, 489 P. 2d 1156; 7 Ore. App. 358, 490 P. 2d 528; 8 Ore. App. 78, 492 P. 2d 305.

No. 71–5407. DAVIS ET AL. *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: See 5 Ore. App. 294, 482 P. 2d 549; 5 Ore. App. 516, 484 P. 2d 327.

No. 71–5875. O'DELL ET AL. *v.* OREGON. Ct. App. Ore. and Sup. Ct. Ore. Certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 7 Ore. App. 9, 17, 488 P. 2d 851 (2 cases); 6 Ore. App. 168, 487 P. 2d 107; 6 Ore. App. 171, 485 P. 2d 1253, and —— Ore. ——, 490 P. 2d 491; 5 Ore. App. 175, 481 P. 2d 653, and 260 Ore. 60, 488 P. 2d 1366; 6 Ore. App. 311, 487 P. 2d 666; 6 Ore. App. 159, 487 P. 2d 112; 6 Ore. App. 160, 487 P. 2d 98.

No. 70–5010. MILLER *v.* OREGON. Ct. App. Ore. Motion of George Wellington Glover to be named a party petitioner and certiorari denied. MR. JUSTICE DOUGLAS dissents. Reported below: 2 Ore. App. 87, 465 P. 2d 894.

No. 71–1045. TOMASINO *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 176.

No. 71–1111. MUSE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 280 N. C. 31, 185 S. E. 2d 214.

No. 71–1434. HARVEST BRAND, INC., NOW HARVEST INDUSTRIES, INC. *v.* A. E. STALEY MANUFACTURING CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 735.

No. 71–6051. BELL *v.* KANSAS. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 452 F. 2d 783.

No. 71–6059. DIXON *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6345. GATLING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6367. INCERTO *v.* PATTERSON, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 71–6387. VINCENT *v.* MOSELEY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 453 F. 2d 1218.

No. 71–6391. FREEMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 147 U. S. App. D. C. 340, 458 F. 2d 759.

No. 71–6392. KORENFELD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 451 F. 2d 770.

No. 71–6401. MINOR ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 455 F. 2d 937.

No. 71–6436. HINES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 147 U. S. App. D. C. 249, 455 F. 2d 1317.

No. 71–6438. BOBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 454 F. 2d 1178.

No. 71–6442. CHESEBROUGH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 255 So. 2d 675.

No. 71–6459. WILLIAMS *v.* MCMANN, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 454 F. 2d 1139.

No. 71–1127. BAILEY *v.* NORTH CAROLINA. Ct. App. N. C. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 12 N. C. App. 494, 183 S. E. 2d 885.

No. 71–1169. MOBIL OIL CORP. *v.* MATZEN ET AL.;
No. 71–1179. AMOCO PRODUCTION CO. *v.* WAECHTER ET AL.;
No. 71–1188. CITIES SERVICE OIL CO. *v.* MATZEN ET AL.;
No. 71–1191. SHELL OIL CO. *v.* MATZEN ET AL.; and
No. 71–1326. FEDERAL POWER COMMISSION *v.* MOBIL OIL CORP. ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 149 U. S. App. D. C. 310, 463 F. 2d 256.

No. 71–1285. PFIZER INC. ET AL. *v.* LORD, U. S. DISTRICT JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 456 F. 2d 532.

No. 71–6161. ERVING *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 453 F. 2d 843.

No. 71–1377. OHIO ANNUAL CONFERENCE OF THE METHODIST CHURCH ET AL. *v.* BETHANY CHAPEL, INC., ET AL. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 71–1331. MONTANYE, CORRECTIONAL SUPERINTENDENT *v.* CLAYTON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 454 F. 2d 454.

No. 71–6393. GREENE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 256.

MR. JUSTICE DOUGLAS, dissenting.

This case involves an apparently lawless action by a Selective Service Board.

The Regulations[1] provide in pertinent part:

> "A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. . . . Every member present . . . shall vote on every question or classification."

While petitioner had been classified as I–A and was ordered to report for induction,[2] prior to the reporting date[3] two letters were submitted to the Local Board asking for reconsideration of petitioner's classification. The Board never considered the letters. The only decision was that of the chairman who talked only with the clerk of the Board. Whether the new presentation would satisfy the Regulations governing the reopening of a

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[1] 32 CFR § 1604.56.

[2] Petitioner was convicted of failure to report for induction and his defense was the Board's failure to follow the Regulations.

[3] The order was mailed March 13, 1970, directing him to report on April 21, 1970.

case can never be known because that is a decision that only the Board can make; and the Board never had a chance to reopen the classification or to keep it closed.

We talk much about law and order. But when we allow a Selective Service Board to act beyond the law, we embark upon a course of conduct that inflames an area already charged with emotions. Those charged with the responsibility of disposing of the lives and liberties of men should be the most meticulous in observing the Regulations which govern them.

I would grant this petition and set the case for argument.

No. 71–6450. TAYLOR *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN are of the opinion that certiorari should be granted. Reported below: 158 Mont. 323, 491 P. 2d 877.

Rehearing Denied

No. 203, October Term, 1970. MCGAUTHA *v.* CALIFORNIA, 402 U. S. 183. Motion for leave to file supplement to petition for rehearing granted. Petition for rehearing denied. *Aikens* v. *California, ante,* p. 813.

No. 71–6020. SUNDLUN *v.* SUNDLUN, 405 U. S. 1068;
No. 71–6066. SULLIVAN *v.* SULLIVAN, 405 U. S. 1070; and
No. 71–6104. PATTERSON *v.* LASH, WARDEN, 405 U. S. 1075. Petitions for rehearing denied.

No. 71–5984. WALKER *v.* TWOMEY, WARDEN, 405 U. S. 1044. Motion for leave to file petition for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Effective October 1, 1972

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 24, 1972, pursuant to 18 U. S. C. §§ 3771 and 3772, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 980. The Judicial Conference report referred to in that letter is not reproduced herein.

The amendments became effective on October 1, 1972, as provided in paragraph 1 of the Court's order, *post*, p. 981.

For earlier publications of the Federal Rules of Criminal Procedure and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, and 401 U. S. 1025.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 24, 1972.

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court, I have the honor to submit to the Congress proposed amendments to the Rules of Criminal Procedure for the United States District Courts and to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court, pursuant to Title 18, United States Code, Section 3771 and Section 3772. MR. JUSTICE DOUGLAS dissents from the approval of Rule 50 (b) of the Rules of Criminal Procedure.

Accompanying these amendments is the report of the Judicial Conference of the United States submitted to the Court for its consideration, pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER
Chief Justice of the United States.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 24, 1972

ORDERED:

1. That Rules 1, 3, 4 (b) & (c), 5, 5.1, 6 (b), 7 (c), 9 (b), (c) & (d), 17 (a) & (g), 31 (e), 32 (b), 38 (a), 40, 41, 44, 46, 50, 54 and 55 of the Federal Rules of Criminal Procedure be, and they hereby are, amended effective October 1, 1972, to read as follows:

[See *infra*, pp. 983–1003.]

2. That Rule 9 (c) of the Federal Rules of Appellate Procedure be, and hereby is amended, effective October 1, 1972, to read as follows:

[See *infra*, p. 1007.]

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to Rules of Criminal and Appellate Procedure, in accordance with the provisions of Title 18, U. S. Code, § 3771 and § 3772.

MR. JUSTICE DOUGLAS, dissenting from the adoption of proposed Rule 50 (b) of the Federal Rules of Criminal Procedure.

The proposal to add subsection (b) to Rule 50 of the Federal Rules of Criminal Procedure is designed to require district courts to promulgate new procedures to break the logjam of pending criminal cases. Plans of a similar nature promulgated by the several Circuits to implement the Criminal Justice Act of 1964, 18 U. S. C. § 3006A were promulgated after Congress directed each district court to adopt plans for providing counsel for indigents. § 3006A (a).

First. There may be several better ways of achieving the desired result. This Court is not able to make discerning judgments between various policy choices where

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the relative advantage of the several alternatives depends on extensive factfinding. That is a "legislative" determination. Under our constitutional system that function is left to the Congress with approval or veto by the President.

Second. The Court is in fact only a conduit for transmitting the Rule to the Congress; in practice little, if any, independent judgment is expressed on the merits of the Rules we transmit. But though we are only a conduit of the Rules, the Court's imprimatur is placed on them.

Accordingly, I do not join in transmitting this new Rule to the Congress and as Justice Black and I have done before (374 U. S. 865), I dissent.

AMENDMENTS TO RULES OF CRIMINAL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Rule 1. Scope

These rules govern the procedure in all criminal proceedings in the courts of the United States, as defined in Rule 54 (c); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrates and at proceedings before state and local judicial officers.

Rule 3. The complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate.

Rule 4. Warrant or summons upon complaint

(*b*) *Form*

(*1*) *Warrant.*—The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate.

(*2*) *Summons.*—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place.

(*c*) *Execution or service; and return*

(*1*) *By whom.*—The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(*2*) *Territorial limits.*—The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(*3*) *Manner.*—The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant, as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(*4*) *Return.*—The officer executing a warrant shall make return thereof to the magistrate or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the magistrate by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to the marshal or other authorized person for execution or service.

Rule 5. Initial appearance before the magistrate

(*a*) *In general.*—An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U. S. C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4 (a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(*b*) *Minor offenses.*—If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U. S. C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(*c*) *Offenses not triable by the United States magistrate.*—If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary exam-

ination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

Rule 5.1. Preliminary examination

(*a*) *Probable cause finding.*—If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses

against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(*b*) *Discharge of defendant.*—If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(*c*) *Records.*—After concluding the proceeding the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall promptly make or cause to be made a record or summary of such proceeding.

(1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.

(2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes a sufficient affidavit that he is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that

a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

Rule 6. The grand jury

(*b*) *Objections to grand jury and to grand jurors*

(*1*) *Challenges.*—The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(*2*) *Motion to dismiss.*—A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 28 U. S. C. § 1867 (e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 7. The indictment and the information

(*c*) *Nature and contents*

(*1*) *In general.*—The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal

conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) *Criminal forfeiture.*—When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

(3) *Harmless error.*—Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 9. Warrant or summons upon indictment or information

(b) *Form*

(1) *Warrant.*—The form of the warrant shall be as provided in Rule 4 (b)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court or, if the information or indictment charges a minor offense, before a United States magistrate. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) *Summons.*—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court or, if the information or indictment charges a minor offense, before a United States magistrate at a stated time and place.

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(c) *Execution or service; and return*

(1) *Execution or service.*—The warrant shall be executed or the summons served as provided in Rule 4 (c) (1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or before a United States magistrate.

(2) *Return.*—The officer executing a warrant shall make return thereof to the court or United States magistrate. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

(d) *Remand to United States magistrate for trial of minor offense.*—If the information or indictment charges a minor offense and the return is to a judge of the district court, the case may be remanded to a United States magistrate for further proceedings in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

Rule 17. Subpoena

(a) *For attendance of witnesses; form; issuance.*—A subpoena shall be issued by the clerk under the seal of

the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United State magistrate in a proceeding before him, but it need not be under the seal of the court.

. . . . .

(*g*) *Contempt.*—Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

Rule 31. Verdict

(*e*) *Criminal forfeiture.*—If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Rule 32. Sentence and judgment

(*b*) *Judgment*

(*1*) *In general.*—A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(*2*) *Criminal forfeiture.*—When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

Rule 38. Stay of execution, and relief pending review

(*a*) *Stay of execution*

(*1*) *Death.*—A sentence of death shall be stayed if an appeal is taken.

(*2*) *Imprisonment.*—A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is released pending disposition of appeal pursuant to Rule 9 (b) of the Federal Rules of Appellate Procedure. If not stayed, the court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the court of appeals.

(*3*) *Fine.*—A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(*4*) *Probation.*—An order placing the defendant on probation may be stayed if an appeal is taken. If not stayed, the court shall specify when the term of probation shall commence. If the order is stayed the court shall fix the terms of the stay.

Rule 40. Commitment to another district; removal

(*a*) *Arrest in nearby district.*—If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest, or without a warrant for an offense committed in another district in the same state or in another state

but at a place less than 100 miles from the place of the arrest, he shall be taken without unnecessary delay before the nearest available federal magistrate; preliminary proceedings shall be conducted in accordance with Rules 5 and 5.1; and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending, or if the arrest was without a warrant, for the district in which the offense was committed. If such an arrest is made on a warrant issued on an indictment or information, the person arrested shall be taken before the district court in which the prosecution is pending or, for the purpose of admission to bail, before a federal magistrate in the district of the arrest in accordance with provisions of Rule 9 (c)(1).

(*b*) *Arrest in distant district*

(*1*) *Appearance before federal magistrate.*—If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available federal magistrate in the district in which the arrest was made.

(*2*) *Statement by federal magistrate.*—The federal magistrate shall inform the defendant of the rights specified in Rule 5 (c), of his right to have a hearing or to waive a hearing by signing a waiver before the federal magistrate, of the provisions of Rule 20, and shall authorize his release under the terms provided for by these rules and by 18 U. S. C. § 3146 and § 3148.

(*3*) *Hearing; warrant of removal or discharge.*—The defendant shall not be called upon to plead. If the defendant waives hearing, a judge of the United States shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the federal magistrate shall hear the evidence. At the hearing the defendant may cross-examine witnesses against him and may introduce evi-

dence in his own behalf. If a United States magistrate hears the evidence he shall report his findings and recommendations to a judge of the United States. If it appears from the United States magistrate's report or from the evidence adduced before the judge of the United States that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. There is "sufficient grounds" for ordering removal under the following circumstances:

(A) If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.

(B) If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged.

(C) If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense is alleged to have been committed is presented.

(*4*) *Bail.*—If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending under the terms provided for by these rules and by 18 U. S. C. § 3146 and § 3148. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(*5*) *Authority of United States magistrate.*—When authorized by a rule of the district court, adopted in accordance with 28 U. S. C. § 636 (b), a United States

magistrate may issue a warrant of removal under subdivision (b)(3) of this rule.

Rule 41. Search and seizure

(*a*) *Authority to issue warrant.*—A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state within the district wherein the property sought is located, upon request of a federal law enforcement officer or an attorney for the government.

(*b*) *Property which may be seized with a warrant.*—A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

(*c*) *Issuance and contents.*—A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of

the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(*d*) *Execution and return with inventory.*—The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(*e*) *Motion for return of property.*—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after

an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

(*f*) *Motion to suppress.*—A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

(*g*) *Return of papers to clerk.*—The federal magistrate before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(*h*) *Scope and definition.*—This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. The term "daytime" is used in this rule to mean the hours from 6:00 a. m. to 10:00 p. m. according to local time. The phrase "federal law enforcement officer" is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54 (c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant.

Rule 44. Right to and assignment of counsel

(*a*) *Right to assigned counsel.*—Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

(*b*) *Assignment procedure.*—The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

Rule 46. Release from custody

(*a*) *Release prior to trial.*—Eligibility for release prior to trial shall be in accordance with 18 U. S. C. § 3146, § 3148, or § 3149.

(*b*) *Release during trial.*—A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly and expeditious progress of the trial.

(*c*) *Pending sentence and notice of appeal.*—Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U. S. C. § 3148. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(*d*) *Justification of sureties.*—Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(*e*) *Forfeiture*

(*1*) *Declaration.*—If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(*2*) *Setting aside.*—The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(*3*) *Enforcement.*—When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering

into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(*4*) *Remission.*—After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(*f*) *Exoneration.*—When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(*g*) *Supervision of detention pending trial.*—The court shall exercise supervision over the detention of defendants and witnesses within the district pending trial for the purpose of eliminating all unnecessary detention. The attorney for the government shall make a biweekly report to the court listing each defendant and witness who has been held in custody pending indictment, arraignment or trial for a period in excess of ten days. As to each witness so listed the attorney for the government shall make a statement of the reasons why such witness should not be released with or without the taking of his deposition pursuant to Rule 15 (a). As to each defendant so listed the attorney for the government shall make a statement of the reasons why the defendant is still held in custody.

Rule 50. Calendars; plan for prompt disposition

(*b*) *Plan for achieving prompt disposition of criminal cases.*—To minimize undue delay and to further the prompt disposition of criminal cases, each district court

shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place, means of reporting the status of cases, and such other matters as are necessary or proper to minimize delay and facilitate the prompt disposition of such cases. The district plan shall include special provision for the prompt disposition of any case in which it appears to the court that there is reason to believe that the pretrial liberty of a particular defendant who is in custody or released pursuant to Rule 46, poses a danger to himself, to any other person, or to the community. The district plan shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of the district court may designate. If approved the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States. The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Each district court shall submit its plan to the reviewing panel not later than 90 days from the effective date of this rule.

Rule 54. Application and exception

(*a*) *Courts.*—These rules apply to all criminal proceedings in the United States District Courts; in the District Court of Guam; in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone Code) in the United States District Court for the

District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that all offenses shall continue to be prosecuted in the District Court of Guam and in the District Court of the Virgin Islands by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury.

(*b*) *Proceedings*

(*1*) *Removed proceedings.*—These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(*2*) *Offenses outside a district or State.*—These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U. S. C. § 3238.

(*3*) *Peace bonds.*—These rules do not alter the power of judges of the United States or of United States magistrates to hold to security of the peace and for good behavior under 18 U. S. C. § 3043, and under Revised Statutes, § 4069, 50 U. S. C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(*4*) *Proceedings before United States magistrates.*—Proceedings involving minor offenses before United States magistrates, as defined in subdivision (c) of this rule, are governed by the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates.

(*5*) *Other proceedings.*—These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20 (d) they do not apply to proceedings under 18 U. S. C., Chapter 403—Juvenile Delinquency—so far as they are inconsistent with

that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300–4305, 33 U. S. C. §§ 391–396, or to proceedings involving disputes between seamen under Revised Statutes, §§ 4079–4081, as amended, 22 U. S. C. §§ 256–258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325–327, 16 U. S. C. §§ 772–772i, or to proceedings against a witness in a foreign country under 28 U. S. C. § 1784.

(c) *Application of terms.*—As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in an insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney and when applicable to cases arising under the laws of Guam means the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

"Federal magistrate" means a United States magistrate as defined in 28 U. S. C. §§ 631–639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial decisions.

"Magistrate" includes a United States magistrate as defined in 28 U. S. C. §§ 631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U. S. C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.

"Minor offense" is defined in 18 U. S. C. § 3401.

"Oath" includes affirmations.

"Petty offense" is defined in 18 U. S. C. § 1 (3).

"State" includes District of Columbia, Puerto Rico, territory and insular possession.

"United States magistrate" means the officer authorized by 28 U. S. C. §§ 631–639.

Rule 55. Records

The clerk of the district court and each United States magistrate shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe. Among the records required to be kept by the clerk shall be a book known as the "criminal docket" in which, among other things, shall be entered each order or judgment of the court. The entry of an order or judgment shall show the date the entry is made.

AMENDMENT TO FEDERAL RULES OF APPELLATE PROCEDURE

Effective October 1, 1972

The following amendment to the Federal Rules of Appellate Procedure was prescribed by the Supreme Court of the United States on April 24, 1972, pursuant to 18 U. S. C. §§ 3771 and 3772, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *ante*, p. 980. The Judicial Conference report referred to in that letter is not reproduced herein.

This amendment became effective October 1, 1972, as provided in paragraph 2 of the Court's order, *ante*, p. 981.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, and 401 U. S. 1029.

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AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 9. Release in criminal cases

. . . . .

(*c*) *Criteria for release.*—The decision as to release pending appeal shall be made in accordance with Title 18, U. S. C. § 3148. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

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tricts and size of houses of the state legislature is not required by the Federal Constitution and is not justified as an exercise of federal power. Sixty-seventh Minnesota State Senate v. Beens, p. 187.

3. *Mental defective charged with crime—Incompetent to stand trial—Committed until certified sane.*—By subjecting accused to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all other persons not charged with offenses, thus condemning accused to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by ordinary civil commitment, State deprived accused of equal protection. Jackson v. Indiana, p. 715.

4. *Workmen's compensation—Illegitimate children.*—Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimate children violates the Equal Protection Clause, as inferior classification of these dependent children bears no significant relationship to the recognized purposes of recovery that workmen's compensation statutes were destined to serve. Weber v. Aetna Casualty & Surety Co., p. 164.

III. Fifth Amendment.

1. *Immunity—Compelled testimony.*—Immunity from use and derivative use is coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination and is sufficient to compel testimony; transactional immunity would afford broader protection than the Fifth Amendment privilege and is not constitutionally required. Kastigar v. United States, p. 441.

2. *Real and substantial fear of foreign prosecution.*—Self-incrimination privilege protects against real dangers, not remote and speculative possibilities, and here there was no showing that witness was in real danger of being compelled to disclose information that might incriminate him under foreign law. Zicarelli v. New Jersey Investigation Comm'n, p. 472.

3. *Statutory immunity—Transactional immunity.*—New Jersey statutory immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and is sufficient to compel testimony. Zicarelli v. New Jersey Investigation Comm'n, p. 472.

4. *Unwilling witness—Immunity from use and derivative use.*—State's immunity statute being at least as broad as the constitutional requirement, uncertainty regarding scope of protection in excess of that requirement is best left to the state courts. Sarno v. Illinois Crime Investigating Comm'n, p. 482.

CONSTITUTIONAL LAW—Continued.

5. *Unwilling witness—Immunity from use and derivative use.*—United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 U. S. C. § 6002, from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings. Kastigar v. United States, p. 441.

IV. First Amendment.

Compulsory high school attendance—Exemption granted to Amish.—Since members of Amish sect have proved that compulsory formal education after eighth grade would gravely endanger free exercise of their religious beliefs and the adequacy of their alternative mode of continuing informal vocational education, it is incumbent on State to show how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. Wisconsin v. Yoder, p. 205.

V. Fourth Amendment.

Business hours—Warrantless search as inspection procedure.—Warrantless search of locked storeroom during business hours as part of inspection procedure authorized by § 923 (g) of the Gun Control Act of 1968, which resulted in seizure of unlicensed firearms from dealer federally licensed to deal in sporting weapons, is not violative of Fourth Amendment. United States v. Biswell, p. 311.

VI. Free Exercise Clause.

Religious beliefs—Children—Compulsory high school attendance.—State's interest in universal education not totally free from a balancing process when it impinges on other fundamental rights specifically protected by the Free Exercise Clause and the traditional interest of parents respecting religious upbringing of their children. Wisconsin v. Yoder, p. 205.

VII. Sixth Amendment.

1. *Assistance of counsel—Whether defendant will testify.*—State statute requiring the accused to testify before any other defense witness or not at all deprives accused of the "guiding hand of counsel," in deciding not only whether defendant will testify but, if so, at what stage. Brooks v. Tennessee, p. 605.

2. *Police station identification—Right to counsel.*—The *per se* exclusionary rule does not apply to a pre-indictment confrontation made without the accused's being advised of the right to counsel. Kirby v. Illinois, p. 682.

CONSTITUTIONAL LAW—Continued.

VIII. Supremacy Clause.

State definition of "continued absence"—Active military service.—State regulations exclude active military service from the definition of a parent's "continued absence from the home" so as to deny AFDC benefits to child and mother of serviceman on active duty; the corresponding criterion of the Social Security Act means that the parent may be absent for any reason, that criterion applies to one who is absent on military service, and California's definition is invalid under the Supremacy Clause. Carleson v. Remillard, p. 598.

CONTEMPT. See **Constitutional Law,** III, 1, 5; **Grand Juries,** 1–2.

CONTINUANCES. See **Criminal Law,** 1; **Pleas.**

CONTINUED ABSENCES. See **Constitutional Law,** VIII; **Social Security Act,** 1.

CONTRACT DISPUTES. See **Government Contracts,** 1–2.

CONTRACTORS. See **Government Contracts,** 1–2.

CONTRACTS. See **Arbitration,** 1–2; **Federal Power Commission,** 1–2; **Jurisdiction,** 4–5; **Labor,** 1–2; **National Labor Relations Act,** 1–2; **Railway Labor Act.**

CONTRIBUTION. See **Admiralty.**

CONTRIBUTORY INFRINGEMENT. See **Patents,** 2.

CORPORATIONS. See **Aliens; Bankruptcy Act; Patents,** 1; **Standing to Sue; Venue.**

COSA NOSTRA. See **Constitutional Law,** III, 2–3.

COST-OF-LIVING ADJUSTMENTS. See **Constitutional Law,** II, 1; **Social Security Act,** 2.

COSTS. See **Procedure,** 5.

COUNSEL. See **Constitutional Law,** I, 2; **Criminal Law,** 1–3; **Juries,** 2; **Pleas.**

COUNTERCLAIMS. See **Bankruptcy Act; International Law; Standing to Sue.**

COUNTER SUITS. See **Procedure,** 5.

COURT OF CLAIMS. See **Government Contracts,** 1–2.

COURTS. See **Jurisdiction,** 2, 6–7; **Pollution.**

CREDITORS. See **Bankruptcy Act; Standing to Sue.**

CRIMINAL CONTEMPT. See **Constitutional Law,** III, 1, 5; **Grand Juries,** 1–2.

CRIMINAL JUSTICE. See **Criminal Law,** 1; **Pleas.**

CRIMINAL LAW. See also **Constitutional Law,** I, 1–3; II, 3; III, 1–5; V; VII, 1–2; **Grand Juries,** 1–2; **Gun Control Act of 1968; Juries,** 1–2; **Mootness; Pleas; Trials.**

1. *Guilty plea on advice of counsel—New counsel—Change of plea.*—Claim that guilty plea was not voluntarily and intelligently made because of alleged conflict of interest on the part of counsel has no merit; therefore, alleged conflict of interest is not reason for vacating plea. Dukes v. Warden, p. 250.

2. *Trial—Conviction.*—Argument that Sixth Amendment requires jury unanimity in order to effectuate the reasonable-doubt standard otherwise mandated by due process requirements is without merit since that Amendment does not require proof beyond a reasonable doubt at all. Apodaca v. Oregon, p. 404.

3. *Warrantless arrest—Commitment—Lineup.*—Lineup conducted, not by the exploitation of the arrest, but under the authority of commitment by magistrate, purged the lineup procedure of any primary taint. Johnson v. Louisiana, p. 356.

CRIMINAL PROCEEDINGS: See **Constitutional Law,** III, 1, 5; **Grand Juries,** 1–2.

CRIMINATION. See **Constitutional Law,** III, 1–5; **Grand Juries,** 1–2.

CROSS SECTION OF THE COMMUNITY. See **Constitutional Law,** I, 3; **Criminal Law,** 2; **Juries,** 1.

CUBA. See **International Law.**

CURTAILMENT PLANS. See **Federal Power Commission,** 1–2; **Jurisdiction,** 4–5.

CUSTODIANS. See **Jurisdiction,** 1; **Procedure,** 2.

DAMAGES. See **Arbitration,** 2; **Bankruptcy Act; Indians; Jurisdiction,** 3; **Railway Labor Act; Securities Exchange Act of 1934; Standing to Sue; Stockholders; Tort Claims Act.**

DEATH SENTENCES. See **Mootness.**

DEBENTURES. See **Bankruptcy Act; Standing to Sue.**

DEBTORS. See **Bankruptcy Act; Standing to Sue.**

DECLARATORY JUDGMENTS. See also **Abstention; Procedure,** 1.

Ambiguous state statute—Resolution by state courts—Federal constitutional questions—Countervailing considerations.—Where a state statute has not yet been construed by the state courts and is unclear in particulars that go to the foundation of the actual controversy, and where there is no countervailing consideration, absten-

DECLARATORY JUDGMENTS—Continued.
tion is appropriate because authoritative resolution of the ambiguities in the state courts is sufficiently likely to avoid or modify the federal constitutional questions. Lake Carriers' Assn. v. MacMullan, p. 498.

DECLARATORY ORDERS. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

DEFENDANTS. See **Constitutional Law**, I, 3; **Criminal Law**, 2; **Juries**, 1.

DEFENSE DEPARTMENT. See **Jurisdiction**, 1; **Procedure**, 2; **Tort Claims Act.**

DELAY. See **Arbitration**, 1; **Labor**, 1.

DELIVERIES. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

DEPARTMENT OF JUSTICE. See **Government Contracts**, 1–2.

DEPENDENT CHILDREN. See **Constitutional Law**, II, 1; VIII; **Social Security Act**, 1–2.

DEPENDENTS. See **Constitutional Law**, II, 4; **Workmen's Compensation.**

DERIVATIVE USE. See **Constitutional Law**, III, 1–5; **Grand Juries**, 1–2.

DETENTION. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

DEVEINERS. See **Patents**, 2.

DIFFERENCES. See **Arbitration**, 1; **Labor**, 1.

DIFFICULTY OF PROVING GUILT. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

DIRECT APPEALS. See **Constitutional Law**, II, 2; **Elections**; **Procedure**, 4, 7.

DIRECT SALES. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

DISCHARGES. See **Arbitration**, 2; **Jurisdiction**, 1; **Procedure**, 2; **Railway Labor Act.**

DISCRIMINATION. See **Constitutional Law**, I, 3; **Criminal Law**, 2; **Juries**, 1.

DISMISSALS. See **Arbitration**, 2; **Railway Labor Act.**

DISPUTES CLAUSES. See **Arbitration**, 1; **Government Contracts**, 1–2; **Labor**, 1.

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DISSENTING JURORS. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

DISTRIBUTION OF ASSETS. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

DISTRIBUTIVE SHARES. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

DISTRICT COURTS. See **Constitutional Law**, II, 2; **Elections**; **Jurisdiction**, 2, 7; **Pollution**; **Procedure**, 4, 7.

DIVIDED LOYALTY. See **Criminal Law**, 1; **Pleas.**

DOCKSIDE TREATMENT FACILITIES. See **Abstention**; **Declaratory Judgments**; **Procedure**, 1.

DOMICILES. See **Jurisdiction**, 1; **Procedure**, 2.

DUE PROCESS. See **Abstention**; **Constitutional Law**, I, 1–3; II, 3; VII, 1; **Criminal Law**, 2–3; **Declaratory Judgments**; **Juries**, 1–2; **Procedure**, 1, 3; **Trials.**

EDUCATION. See **Constitutional Law**, IV; VI.

EFFECTIVE ASSISTANCE OF COUNSEL. See **Criminal Law**, 1; **Pleas.**

ELECTED OFFICIALS. See **Constitutional Law**, II, 2; **Elections**; **Procedure**, 4, 7.

ELECTIONS. See also **Constitutional Law**, II, 2; **Labor**, 2; **National Labor Relations Act**, 1–2; **Procedure**, 4, 6–7.

Equal protection of the laws—Elections—Legislative districts.—Federal reapportionment court should accommodate relief ordered to the appropriate provisions of state statutes relating to legislature's size as far as possible; action of District Court in so drastically changing number of districts and size of houses of the state legislature is not required by the Federal Constitution and is not justified as an exercise of federal power. Sixty-seventh Minnesota State Senate v. Beens, p. 187.

ELEMENTARY EDUCATION. See **Constitutional Law**, IV; VI.

ELIGIBLE INDIVIDUALS. See **Constitutional Law**, II, 1; VIII; **Social Security Act**, 1–2.

EMPLOYER AND EMPLOYEES. See **Arbitration**, 1–2; **Labor**, 1–2; **National Labor Relations Act**, 1–2; **Railway Labor Act.**

EMPLOYMENT CONTRACTS. See **Arbitration**, 2; **Railway Labor Act.**

ENVIRONMENTAL PROTECTION AGENCY. See **Abstention**; **Declaratory Judgments**; **Procedure**, 1.

EQUAL PROTECTION OF THE LAWS. See **Abstention; Constitutional Law,** I, 1–3; II, 1–4; **Criminal Law,** 1–3; **Declaratory Judgments; Elections; Juries,** 1–2; **Pleas; Procedure,** 1, 3–4, 7; **Social Security Act,** 2; **Workmen's Compensation.**

EQUITY. See **Bankruptcy Act; Standing to Sue.**

ESCH CAR SERVICE ACT OF 1917. See **Administrative Procedure Act; Interstate Commerce Commission.**

ESTATES. See **Bankruptcy Act; Standing to Sue.**

EVIDENCE. See **Constitutional Law,** I, 2; III, 1, 5; **Criminal Law,** 3; **Grand Juries,** 1–2; **Juries,** 2.

EXCEPTIONS TO MASTER'S REPORT. See **Boundaries.**

EXCLUSIONARY RULES. See **Constitutional Law,** VII, 2.

EXCLUSIVE REMEDIES. See **Arbitration,** 2; **Railway Labor Act.**

EXECUTIVE BRANCH. See **International Law.**

EXHAUSTION OF ADMINISTRATIVE REMEDIES. See **Federal Power Commission,** 1–2; **Jurisdiction,** 4–5.

EXHAUSTION OF REMEDIES. See **Arbitration,** 2; **Railway Labor Act.**

EXPLOITATION. See **Constitutional Law,** I, 2; **Criminal Law,** 3; **Juries,** 2.

EXPORTS. See **Patents,** 2.

EXPROPRIATIONS. See **International Law.**

EXTRINSIC DELAY. See **Arbitration,** 1; **Labor,** 1.

FEDERAL COMMON LAW. See **Jurisdiction,** 2, 7; **Pollution.**

FEDERAL COMMUNICATIONS COMMISSION.

CATV regulation—Operation as local outlet—Available facilities for local production and presentation.—FCC has authority to make rule that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." United States v. Midwest Video Corp., p. 649.

FEDERAL EMPLOYEES. See **Tort Claims Act.**

FEDERAL FORUMS. See **Aliens; Patents,** 1; **Venue.**

FEDERAL JURY TRIALS. See **Constitutional Law,** I, 3; **Criminal Law,** 2; **Juries,** 1.

FEDERALLY LICENSED DEALERS. See **Constitutional Law,** V; **Gun Control Act of 1968.**

FEDERAL POWER COMMISSION. See also **Jurisdiction,** 4–5.

1. *Natural gas shortage—Curtailed deliveries to direct-sales customers—FPC certification.*—Federal Power Commission has jurisdiction to regulate curtailment of direct interstate sales of natural gas under the head of its "transportation" jurisdiction. FPC v. Louisiana Power & Light Co., p. 621.

2. *Natural gas shortage—Intrastate "Green System"—FPC jurisdiction.*—Federal Power Commission has primary jurisdiction to determine whether the Green System (intrastate) was subject to its authority, and the Court of Appeals erred in deciding that question. FPC v. Louisiana Power & Light Co., p. 621.

FEDERAL REAPPORTIONMENT COURTS. See **Constitutional Law,** II, 2; **Elections; Procedure,** 4, 7.

FEDERAL-STATE RELATIONS. See **Abstention; Arbitration,** 2; **Constitutional Law,** III, 4; VIII; **Declaratory Judgments; Federal Power Commission,** 1–2; **Jurisdiction,** 4–5; **Procedure,** 1; **Railway Labor Act; Social Security Act,** 1.

FEDERAL TORT CLAIMS ACT. See **Tort Claims Act.**

FEDERAL WATER POLLUTION CONTROL ACT. See **Abstention; Declaratory Judgments; Jurisdiction,** 2, 7; **Pollution; Procedure,** 1.

FEDERAL WITNESS IMMUNITY STATUTE. See **Constitutional Law,** III, 1, 5; **Grand Juries,** 1–2.

FIFTH AMENDMENT. See **Constitutional Law,** III, 1–5; VII, 1; **Grand Juries,** 1–2; **Trials.**

"FINAL AND CONCLUSIVE." See **Government Contracts,** 1–2.

FINANCIAL INCENTIVES. See **Constitutional Law,** II, 1; **Social Security Act,** 2.

FIREARMS. See **Constitutional Law,** V; **Gun Control Act of 1968.**

FIRST AMENDMENT. See **Constitutional Law,** IV; VI; **Procedure,** 6.

FOREIGN AFFAIRS. See **International Law.**

FOREIGN BUYERS. See **Patents,** 2.

FOREIGN COMMUNICATIONS. See **Federal Communications Commission.**

FOREIGN LAW. See **Constitutional Law,** III, 2–3.

FOREIGN VESSELS. See **Abstention, Declaratory Judgments; Procedure,** 1.

FORMAL CHARGES. See **Constitutional Law,** VII, 2.

FORMAL EDUCATION. See **Constitutional Law,** IV; VI.

FOURTEENTH AMENDMENT. See **Constitutional Law,** I, 1–3; II, 1, 3–4; VII, 1; VIII; **Criminal Law,** 1–3; **Juries,** 1–2; **Pleas; Procedure,** 3; **Social Security Act,** 1–2; **Trials; Workmen's Compensation.**

FOURTH AMENDMENT. See **Constitutional Law,** I, 2; V; **Criminal Law,** 3; **Gun Control Act of 1968; Juries,** 2.

FRANCHISES. See **Federal Communications Commission.**

FRAUD. See **Government Contracts,** 1–2; **Indians; Jurisdiction,** 3; **Securities Exchange Act of 1934; Stockholders.**

FREEDOM OF RELIGION. See **Constitutional Law,** IV; VI.

FREE EXERCISE CLAUSE. See **Constitutional Law,** IV; VI.

FREIGHT CARS. See **Administrative Procedure Act; Interstate Commerce Commission.**

FRIVOLOUS APPEALS. See **Procedure,** 5.

FULL-BLOODS. See **Indians; Jurisdiction,** 3; **Securities Exchange Act of 1934; Stockholders.**

GAS. See **Federal Power Commission,** 1–2; **Jurisdiction,** 4–5.

GENERAL ACCOUNTING OFFICE. See **Government Contracts,** 1–2.

GEORGIA. See **Arbitration,** 2; **Railway Labor Act.**

GOOD FAITH. See **Procedure,** 5.

GOVERNMENT CONTRACTS.

1. *Disputes clause—Wunderlich Act—Review by GAO.*—Atomic Energy Commission, which for purpose of this contract was the United States, had exclusive administrative authority under disputes clause procedure to resolve dispute, and neither contract between the parties nor the Wunderlich Act permitted still further administrative review by GAO. S&E Contractors v. United States, p. 1.

2. *Wunderlich Act—Appeal—Department of Justice.*—Wunderlich Act does not confer upon Department of Justice the right to appeal from a decision of an administrative agency, nor is this a case involving a contractor's fraud, concerning which the Department has broad powers to act under several statutory provisions. S&E Contractors v. United States, p. 1.

GOVERNMENT EMPLOYEES. See **Tort Claims Act.**

GRAND JURIES. See also **Constitutional Law**, III, 1, 5.

1. *Fifth Amendment—Immunity—Compelled testimony.*—Immunity from use and derivative use is coextensive with the scope of the Fifth Amendment privilege against compulsory self-incrimination and is sufficient to compel testimony; transactional immunity would afford broader protection than the Fifth Amendment privilege and is not constitutionally required. Kastigar v. United States, p. 441.

2. *Fifth Amendment—Unwilling witness—Immunity from use and derivative use.*—United States can compel testimony from an unwilling witness who invokes the Fifth Amendment privilege against compulsory self-incrimination by conferring immunity, as provided by 18 U. S. C. § 6002, from use of the compelled testimony and evidence derived therefrom in subsequent criminal proceedings. Kastigar v. United States, p. 441.

GREAT LAKES. See **Abstention; Declaratory Judgments; Procedure**, 1.

GREEN SYSTEM. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

GRIEVANCES. See **Arbitration**, 2; **Railway Labor Act.**

GUARDS. See **Labor**, 2; **National Labor Relations Act**, 1–2.

"GUIDING HAND OF COUNSEL." See **Constitutional Law**, VII, 1; **Trials.**

GUILTY PLEAS. See **Criminal Law**, 1; **Pleas.**

GUILTY VERDICTS. See **Constitutional Law**, I, 2–3; **Criminal Law**, 2–3; **Juries**, 1–2.

GUN CONTROL ACT OF 1968. See also **Constitutional Law**, V.

Fourth Amendment—Business hours—Warrantless search as inspection procedure.—Warrantless search of locked storeroom during business hours as part of inspection procedure authorized by § 923 (g) of the Gun Control Act of 1968, which resulted in seizure of unlicensed firearms from dealer federally licensed to deal in sporting weapons, is not violative of Fourth Amendment. United States v. Biswell, p. 311.

HABEAS CORPUS. See **Jurisdiction**, 1; **Procedure**, 2.

HARD LABOR. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

HIGH SCHOOLS. See **Constitutional Law**, IV; VI.

HIRING. See **Labor**, 2; **National Labor Relations Act**, 1–2.

HOLDERS OF DEBENTURES. See **Bankruptcy Act; Standing to Sue.**

HOLDING TANKS. See **Abstention; Declaratory Judgments; Procedure,** 1.

HUNG JURIES. See **Constitutional Law,** I, 3; **Criminal Law,** 2; **Juries,** 1.

IDENTIFICATIONS. See **Constitutional Law,** I, 2; **Criminal Law,** 3; **Juries,** 2.

ILLEGAL ARRESTS. See **Constitutional Law,** I, 2; **Criminal Law,** 3; **Juries,** 2.

ILLEGAL ENTRIES. See **Constitutional Law,** I, 2; **Criminal Law,** 3; **Juries,** 2.

ILLEGITIMATE CHILDREN. See **Constitutional Law,** II, 4; **Workmen's Compensation.**

ILLINOIS. See **Constitutional Law,** III, 4; VII, 2; **Jurisdiction,** 2, 7; **Pollution.**

IMMUNITY. See **Constitutional Law,** III, 1, 5; **Grand Juries,** 1–2.

IMPEACHMENT. See **Constitutional Law,** VII, 1; **Trials.**

INACTIVE RESERVE. See **Jurisdiction,** 1; **Procedure,** 2.

INCOME. See **Constitutional Law,** II, 1; **Social Security Act,** 2.

INCOMPETENTS. See **Constitutional Law,** I, 1; II, 3; **Procedure,** 3.

INCRIMINATION. See **Constitutional Law,** III, 1, 5; **Grand Juries,** 1–2.

INDEFINITE COMMITMENTS. See **Constitutional Law,** I, 1; II, 3; **Procedure,** 3.

INDENTURE TRUSTEES. See **Bankruptcy Act; Standing to Sue.**

INDIANA. See **Constitutional Law,** I, 1; II, 3; **Jurisdiction,** 1; **Procedure,** 2–3.

INDIAN ALLOTMENTS. See **Indians; Jurisdiction,** 3; **Securities Exchange Act of 1934; Stockholders.**

INDIANS. See also **Jurisdiction,** 3; **Securities Exchange Act of 1934; Stockholders.**

Ute Partition Act—Termination of trust—Right of first refusal.—The Act and the 1961 termination proclamation ended federal supervision over the trust and the mixed-bloods' restricted property, including the UDC shares, and the right of first refusal specified

INDIANS—Continued.

in the UDC corporate articles created no duty on the Government's part to terminated mixed-bloods seeking to sell their shares. Affiliated Ute Citizens v. United States, p. 128.

INDIGENTS. See **Procedure**, 5.

INDUSTRIAL USERS. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

INFRINGEMENT. See **Aliens**; **Patents**, 1–2; **Venue.**

INJUNCTIONS. See **Boundaries**; **Constitutional Law**, II, 1; VIII; **Elections**; **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5; **Patents**, 2; **Procedure**, 4, 6, 7; **Social Security Act**, 1.

INSANITY. See **Constitutional Law**, I, 1; II, 3; **Procedure**, 3.

INSPECTIONS. See **Constitutional Law**, V; **Gun Control Act of 1968.**

INSTITUTIONALIZATION. See **Constitutional Law**, I, 1; II, 3; **Procedure**, 3.

INTERNATIONAL CRIME. See **Constitutional Law**, II, 2–3.

INTERNATIONAL LAW.

Counterclaim against foreign national—Excess collateral—Offset for Cuban expropriation.—In circumstances of this case, petitioner American bank, in suit brought by respondent for excess collateral respondent had pledged with petitioner, may assert counterclaim for that excess as offset against value of petitioner's property in Cuba expropriated by Cuba without compensation. First Nat. City Bank v. Banco Nacional de Cuba, p. 759.

INTERSTATE COMMERCE. See **Federal Communications Commission**; **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

INTERSTATE COMMERCE COMMISSION. See also **Administrative Procedure Act.**

Freight car shortages—Industry code of car-service rules—Promulgation by ICC.—Two car-service rules promulgated by ICC requiring generally that unloaded freight cars be returned in the direction of the owning railroad are reasonable under the Esch Car Service Act of 1917, in view of finding, for which there is substantial record support, of a national freight car shortage and conclusion that the shortage could be alleviated by mandatory observance of the rules which would give the railroads greater use of their cars and provide an incentive for the purchase of new equipment. United States v. Allegheny-Ludlum Steel, p. 742.

INTERSTATE WATER POLLUTION. See **Abstention**; **Declaratory Judgments**; **Jurisdiction**, 2, 7; **Pollution**; **Procedure**, 1.

INTERVENTION. See **Constitutional Law,** II, 2; **Elections; Procedure,** 4, 7.

INTRASTATE DELIVERIES. See **Federal Power Commission,** 1–2; **Jurisdiction,** 4–5.

INTRINSIC DELAY. See **Arbitration,** 1; **Labor,** 1.

INVENTIONS. See **Patents,** 2.

INVESTIGATIONS. See **Constitutional Law,** III, 1–5; VII, 2; **Grand Juries,** 1–2.

INVESTORS. See **Brankruptcy Act; Standing to Sue.**

INVOLUNTARY. See **Criminal Law,** 1; **Pleas.**

IOWA-NEBRASKA BOUNDARY COMPACT. See **Boundaries.**

ISLANDS. See **Boundaries.**

JOINT TORTFEASORS. See **Admiralty.**

JUDGES. See **Constitutional Law,** I, 3; **Criminal Law,** 2; **Juries,** 1.

JUDGMENTS. See **Procedure,** 5.

JUDICIAL REVIEW. See **Arbitration,** 2; **Government Contracts,** 1–2; **Procedure,** 5–6; **Workmen's Compensation.**

JURIES. See also **Constitutional Law,** I, 2–3; **Criminal Law,** 2–3.

1. *Jury selection—Racial minority members.*—Jury unanimity is not mandated by the Fourteenth Amendment requirement that racial minorities not be systematically excluded from jury-selection process; even when racial minority members are on jury, it does not follow that their views will not be just as rationally considered by other jury members as would be the case under a unanimity rule. Apodaca v. Oregon, p. 404.

2. *Legislative plan varying size of jury—Gravity of offense—Number needed to convict.*—Louisiana legal scheme providing for unanimous verdicts in capital and five-man jury cases, but for less-than-unanimous verdicts otherwise, and which varies difficulty of proving guilt with gravity of the offense, was designed to serve rational purposes and does not constitute an invidious classification violative of equal protection. Johnson v. Louisiana, p. 356.

JURISDICTION. See also **Aliens; Arbitration,** 2; **Federal Power Commission,** 1–2; **Indians; International Law; Patents,** 1; **Pollution; Procedure,** 2; **Railway Labor Act; Securities Exchange Act of 1934; Stockholders; Venue.**

1. *Application for conscientious objector discharge—California domicile—Indiana nominal command.*—District Court has jurisdic-

JURISDICTION—Continued.

tion under 28 U. S. C. § 2241 (c)(1) to hear and determine habeas corpus application of officer on unattached, inactive Army reserve duty while domiciled in California, where military authorities processed his application for conscientious objector discharge, although he was under the nominal command of commanding officer of the Reserve Officer Components Personnel Center in Indiana. Strait v. Laird, p. 341.

2. *Federal district courts—Interstate water pollution.*—In this case the appropriate federal district court has jurisdiction under 28 U. S. C. § 1331 (a) to give relief against nuisance of interstate water pollution and is the proper forum for litigation of the issues involved. Illinois v. City of Milwaukee, p. 91.

3. *Indian suit against United States—Mineral rights.*—Suit was properly dismissed for want of jurisdiction as uncontested suit against the United States. Though the Government has consented to suits to enforce an Indian's right to an allotment of land, the claimed interest in the mineral estate has not been made subject to an allotment. Affiliated Ute Citizens v. United States, p. 128.

4. *Natural gas shortage—Curtailed deliveries to direct-sales customers—FPC certification.*—Federal Power Commission has jurisdiction to regulate curtailment of direct interstate sales of natural gas under the head of its "transportation" jurisdiction. FPC v. Louisiana Power & Light Co., p. 621.

5. *Natural gas shortage—Intrastate "Green System"—FPC jurisdiction.*—Federal Power Commission has primary jurisdiction to determine whether the Green System (intrastate) was subject to its authority, and the Court of Appeals erred in deciding that question. FPC v. Louisiana Power & Light Co., p. 621.

6. *Supreme Court—Air pollution—Control devices for automobiles.*—Though Court has original but not exclusive jurisdiction, it exercises discretion to avoid impairing its ability to administer its appellate docket. As a matter of law as well as of practical necessity, remedies for air pollution must be considered in context of local situations, making it advisable that this controversy be resolved in appropriate federal district courts. Washington v. General Motors Corp., p. 109.

7. *Supreme Court—District courts—Suit against States.*—Though Wisconsin could be joined as defendant here under appropriate pleadings, it is not mandatory that it be made one, and the political subdivisions are not "States" within the meaning of 28 U. S. C. § 1251 (a)(1). If those subdivisions may be sued by Illinois in a federal district court, this Court's original jurisdiction under § 1251 (b)(3) is merely permissible. Illinois v. City of Milwaukee, p. 91.

JURISDICTIONAL PIPELINES. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

JURY IRRESPONSIBILITY. See **Constitutional Law**, I, 3; **Criminal Law**, 2; **Juries**, 1.

JUSTICE DEPARTMENT. See **Government Contracts**, 1–2.

JUSTICIABLE CONTROVERSIES. See **Abstention; Declaratory Judgments; Procedure**, 1.

LABOR. See also **Arbitration**, 1–2; **National Labor Relations Act**, 1–2; **Railway Labor Act.**

1. *Collective-bargaining agreement—Arbitration clause—"Any difference"—Laches.*—Where collective-bargaining agreement included arbitration "of any difference," the parties did agree to arbitrate and, the existence and scope of an arbitration clause being matters for judicial decision, the phrase "any difference" encompasses the issue of laches within the broad sweep of its arbitration coverage. Operating Engineers v. Flair Builders, Inc., p. 487.

2. *Successor employer—Incumbent union.*—Successor employer may be bound to recognize and bargain with incumbent union, but is not bound by substantive provisions of a collective-bargaining agreement negotiated by its predecessor but not agreed to or assumed by the successor employer. NLRB v. Burns Security Services, p. 272.

LABOR CONTRACTS. See **Labor**, 2; **National Labor Relations Act**, 1–2.

LABOR ELECTIONS. See **Labor**, 2; **National Labor Relations Act**, 1–2.

LABOR-MANAGEMENT RELATIONS. See **Arbitration**, 2; **Labor**, 2; **National Labor Relations Act**, 1–2; **Railway Labor Act.**

LABOR UNIONS. See **Labor**, 2; **National Labor Relations Act**, 1–2.

LACHES. See **Arbitration**, 1; **Labor**, 1.

LACK OF CAPACITY. See **Constitutional Law**, I, 1; II, 3; **Procedure**, 3.

LAKE MICHIGAN. See **Jurisdiction**, 2, 7; **Pollution.**

LAND TITLES. See **Boundaries.**

LAWS. See **Jurisdiction**, 2, 7; **Pollution.**

LAWYERS. See **Constitutional Law**, VII, 1–2; **Criminal Law**, 1; **Pleas; Trials.**

LEGISLATIVE APPORTIONMENT. See **Constitutional Law**, II, 2; **Elections; Procedure**, 4, 7.

LEGISLATIVE DISTRICTS. See **Constitutional Law**, II, 2; **Elections**; **Procedure**, 4, 7.

LEGISLATIVE INTENT. See **Aliens**; **Patents**, 1; **Venue.**

LEGISLATIVE JUDGMENT. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

LEGITIMATE SOURCE. See **Constitutional Law**, III, 1, 5; **Grand Juries**, 1–2.

LESS-THAN-UNANIMOUS VERDICTS. See **Constitutional Law**, I, 2–3; **Criminal Law**, 2–3; **Juries**, 1–2.

LEVELS OF PAYMENT. See **Constitutional Law**, II, 1; **Social Security Act**, 2.

LIABILITY OF BANKS. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

LICENSES. See **Federal Communications Commission.**

LIGHTER SENTENCES. See **Criminal Law**, 1; **Pleas.**

LINEUPS. See **Constitutional Law**, I, 1; VII, 2; **Criminal Law**, 3; **Juries**, 2.

LIVE PROGRAMING. See **Federal Communications Commission.**

LOCAL OUTLETS. See **Federal Communications Commission.**

LOCKED STOREROOMS. See **Constitutional Law**, V; **Gun Control Act of 1968.**

LOCKHEED. See **Labor**, 2; **National Labor Relations Act**, 1–2.

LONG-ARM STATUTES. See **Aliens**; **Patents**, 1; **Venue.**

LONG BRANCH. See **Constitutional Law**, III, 2–3.

LOSSES. See **Bankruptcy Act**; **Standing to Sue.**

LOUISIANA. See **Constitutional Law**, I, 2; II, 4; **Criminal Law**, 3; **Federal Power Commission**, 1–2; **Juries**, 2; **Jurisdiction**, 4–5; **Patents**, 2; **Workmen's Compensation.**

LOYALTY AFFIDAVITS. See **Procedure**, 6.

MAGISTRATES. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

MALAPPORTIONMENT. See **Constitutional Law**, II, 2; **Elections**; **Procedure**, 4, 7.

MANAGEMENT OF INDIAN ASSETS. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

MANUFACTURE OF CONSTITUENT PARTS. See **Patents**, 2.

MARINE TOILETS. See **Abstention; Declaratory Judgments; Procedure**, 1.

MARITIME INJURIES. See **Admiralty.**

MARITIME LAW. See **Abstention; Declaratory Judgments; Procedure**, 1.

MAXIMIZED INDIVIDUAL ELIGIBILITY. See **Constitutional Law**, II, 1; **Social Security Act**, 2.

MEASURE OF DAMAGES. See **Indians; Jurisdiction**, 3; **Securities Exchange Act of 1934; Stockholders.**

MEDIATION. See **Arbitration**, 2; **Railway Labor Act.**

MEMORANDUM AGREEMENTS. See **Arbitration**, 1; **Labor**, 1.

MENNONITE CHURCH. See **Constitutional Law**, IV; VI.

MENTAL DEFECTIVES. See **Constitutional Law**, I, 1; II, 3; **Procedure**, 3.

MICHIGAN. See **Abstention; Declaratory Judgments; Procedure**, 1.

MILITARY DUTY. See **Constitutional Law**, VIII; **Social Security Act**, 1.

"MILITARY ORPHANS." See **Constitutional Law**, VIII; **Social Security Act**, 1.

MILITARY PLANES. See **Tort Claims Act.**

MILITARY RECORDS. See **Jurisdiction**, 1; **Procedure**, 2.

MILWAUKEE. See **Jurisdiction**, 2, 7; **Pollution.**

MINERAL RIGHTS. See **Indians; Jurisdiction**, 3; **Securities Exchange Act of 1934; Stockholders.**

MINNESOTA. See **Constitutional Law**, II, 2; **Elections; Procedure**, 4, 7.

MINOR DISPUTES. See **Arbitration**, 2; **Railway Labor Act.**

MINORITY GROUPS. See **Constitutional Law**, II, 1; **Social Security Act**, 2.

MINORITY JURORS. See **Constitutional Law**, I, 2–3; **Criminal Law**, 2–3; **Juries**, 1–2.

MISCONDUCT. See **Bankruptcy Act; Standing to Sue.**

MISREPRESENTATIONS. See **Indians; Jurisdiction**, 3; **Securities Exchange Act of 1934; Stockholders.**

MISSOURI RIVER. See **Boundaries.**

MIXED-BLOODS. See **Indians; Jurisdiction,** 3; **Securities Exchange Act of 1934; Stockholders.**

MONETARY RESTITUTION. See **Labor,** 2; **National Labor Relations Act,** 1–2.

MOOTNESS. See also **Procedure,** 6.

Death sentence—Unconstitutional under state constitution—Full retroactive application.—California Supreme Court decision invalidating death penalty under state constitution has mooted this case, where certiorari was granted to consider whether death penalty comports with Federal Constitution. Aikens v. California, p. 813.

MOTOR VEHICLE POLLUTION. See **Jurisdiction,** 6.

NATIONAL CAR POOL SYSTEM. See **Administrative Procedure Act; Interstate Commerce Commission.**

NATIONALIZED PROPERTY. See **International Law.**

NATIONAL LABOR RELATIONS ACT. See also **Labor,** 2.

1. *Labor election—Successor employer—Refusal to honor collective-bargaining agreement.*—Where majority of employees hired by new employer were represented by recently certified bargaining agent and bargaining unit remained unchanged, NLRB correctly ordered new employer to bargain with incumbent union. NLRB v. Burns Security Services, p. 272.

2. *Successor employer—Existing terms and conditions of employment—Initial basis for hiring.*—NLRB order for monetary restitution improper in that new employer, having no outstanding contract with union, did not unilaterally change existing terms and conditions of employment by specifying basis on which it would hire employees of previous employer. NLRB v. Burns Security Services, p. 272.

NATIONAL RAILROAD ADJUSTMENT BOARD. See **Arbitration,** 2; **Railway Labor Act.**

NATURAL GAS ACT. See **Federal Power Commission,** 1–2; **Jurisdiction,** 4–5.

NATURAL RESOURCES. See **Abstention; Declaratory Judgments; Procedure,** 1.

NAVIGABLE WATERS. See **Abstention; Declaratory Judgments; Procedure,** 1.

NEBRASKA. See **Boundaries.**

NEEDY CHILDREN. See **Constitutional Law,** VIII; **Social Security Act,** 1.

NEGLIGENCE. See **Tort Claims Act.**

NEW EMPLOYERS. See **Labor**, 2; **National Labor Relations Act**, 1–2.

NEW JERSEY. See **Constitutional Law**, III, 2–3.

NOMINAL COMMAND. See **Jurisdiction**, 1; **Procedure**, 2.

NONCOLLISIONS. See **Admiralty.**

NORTH CAROLINA. See **Tort Claims Act.**

NOT-GUILTY PLEAS. See **Criminal Law**, 1; **Pleas.**

NOT-GUILTY VERDICTS. See **Constitutional Law**, I, 2–3; **Criminal Law**, 2–3; **Juries**, 1–2.

NUISANCES. See **Jurisdiction**, 2, 7; **Pollution.**

OATHS. See **Procedure**, 6.

OCCUPATIONAL TAXES. See **Constitutional Law**, V; **Gun Control Act of 1968.**

OFFICERS. See **Jurisdiction**, 1; **Procedure**, 2.

OFFICIAL CONDUCT. See **Constitutional Law**, V; **Gun Control Act of 1968.**

OFFSETS. See **Government Contracts**, 1–2; **International Law.**

OHIO. See **Procedure**, 6.

OIL SHALE DEPOSITS. See **Indians; Jurisdiction**, 3; **Securities Exchange Act of 1934; Stockholders.**

OLD ORDER AMISH. See **Constitutional Law**, IV; VI.

ON-BOARD TREATMENT. See **Abstention; Declaratory Judgments; Procedure**, 1.

ONTARIO INTERNATIONAL AIRPORT. See **Labor**, 2; **National Labor Relations Act**, 1–2.

OPERABLE ASSEMBLY. See **Patents**, 2.

OREGON. See **Aliens; Constitutional Law**, I, 3; **Criminal Law**, 2; **Juries**, 1; **Patents**, 1; **Venue.**

ORGANIZED CRIME. See **Constitutional Law**, III, 2–4.

ORIGINAL JURISDICTION. See **Jurisdiction**, 2, 7; **Pollution.**

PARENS PATRIAE. See **Constitutional Law**, IV; VI.

PARENTS. See **Constitutional Law**, IV; VI.

PARTIES. See **Jurisdiction**, 2, 7; **Pollution.**

PARTITION SUITS. See **Indians; Jurisdiction**, 3; **Securities Exchange Act of 1934; Stockholders.**

PARTS. See **Patents**, 2.

PASSENGER VESSELS. See **Abstention; Declaratory Judgments; Procedure**, 1.

PATENTS. See also **Aliens; Venue.**

1. *Alien corporation—Patent infringement—Place of incorporation—Place of doing business.*—Title 28 U. S. C. § 1391 (d), providing that "an alien may be sued in any district," embodies the long-established rule that a suit against an alien is wholly outside the operation of all federal venue laws; hence § 1400 (b), which provides that a patent infringement suit may be brought in the district of the defendant's residence or where he has committed infringement acts and has a regular place of business, is not the exclusive provision governing venue in patent infringement litigation. Brunette Machine Wks. v. Kockum Industries, p. 706.

2. *Manufacture of parts—Sale to foreign buyers—Assembly and use abroad.*—The word "makes" as used in 35 U. S. C. § 271 (a) does not extend to the manufacture of the constituent parts of a combination machine, and the unassembled export of the elements of an invention does not infringe the patent. Deepsouth Packing Co. v. Laitram Corp., p. 518.

PAUPERS. See **Procedure**, 5.

PAWN SHOPS. See **Constitutional Law**, V; **Gun Control Act of 1968.**

PEAK-DAY COMMITMENTS. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

PERCENTAGE-REDUCTION FACTOR. See **Constitutional Law**, II, 1; **Social Security Act**, 2.

PER SE EXCLUSIONARY RULE. See **Constitutional Law**, VII, 2.

PERSONS. See **Aliens; Patents**, 1; **Venue.**

PIPELINES. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

PLACE OF BUSINESS. See **Aliens; Patents**, 1; **Venue.**

PLANT GUARDS. See **Labor**, 2; **National Labor Relations Act**, 1–2.

PLANT PROTECTION SERVICE. See **Labor**, 2; **National Labor Relations Act**, 1–2.

PLEA BARGAINING. See **Criminal Law**, 1; **Pleas.**

PLEADINGS. See **Jurisdiction**, 2, 7; **Pollution.**

PLEAS. See also **Criminal Law**, 1.

Guilty plea on advice of counsel—New counsel—Change of plea.—Claim that guilty plea was not voluntarily and intelligently made because of alleged conflict of interest on the part of counsel has no merit; therefore, alleged conflict of interest is not reason for vacating plea. Dukes v. Warden, p. 250.

POLICE STATIONS. See **Constitutional Law**, VII, 2.

POLITICAL CORRUPTION. See **Constitutional Law**, III, 2–3.

POLITICAL PARTIES. See **Procedure**, 6.

POLITICAL SUBDIVISIONS. See **Jurisdiction**, 2, 7; **Pollution.**

POLLUTION. See also **Abstention**; **Declaratory Judgments**; **Jurisdiction**, 2, 6–7; **Procedure**, 1.

Interstate navigable waters—Federal common law—Relief.—Federal common law applies to air and water in their ambient or interstate aspects and federal equity courts have a wide range of powers to grant relief against pollution of this sort. Illinois v. City of Milwaukee, p. 91.

POLLUTION CONTROL DEVICES. See **Jurisdiction**, 6.

POST-INDICTMENT PRETRIAL LINEUPS. See **Constitutional Law**, VII, 2.

PRE-EMPTION. See **Abstention**; **Declaratory Judgments**; **Procedure**, 1.

PREJUDICIAL PROCEDURES. See **Constitutional Law**, VII, 2.

PRELIMINARY HEARINGS. See **Constitutional Law**, VII, 2.

PREMATURITY. See **Procedure**, 6.

PRETRIAL PROCEDURES. See **Constitutional Law**, VII, 2.

PRIMARY JURISDICTION. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

PRIMARY TAINT. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

PRIORITIES. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

PRIVILEGES. See **Constitutional Law**, VII, 1; **Trials.**

PROCEDURE. See also **Abstention**; **Admiralty**; **Administrative Procedure Act**; **Aliens**; **Arbitration**, 2; **Bankruptcy Act**; **Constitutional Law**, I, 1; II, 2–3; VII, 1; **Criminal Law**, 1; **Declaratory Judgments**; **Elections**; **Federal Power Commission**, 1–2; **Government Contracts**, 1–2; **International Law**;

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PROCEDURE—Continued.

Interstate Commerce Commission; Jurisdiction, 2, 4–5, 7; **Mootness; Patents**, 1; **Pleas; Pollution; Railway Labor Act; Standing to Sue; Trials; Venue.**

1. *Ambiguous state statute—Resolution by state courts—Avoidance or modification of federal constitutional questions—Absence of countervailing considerations.*—Where a state statute has not yet been construed by the state courts and is unclear in particulars that go to the foundation of the actual controversy, and where there is no countervailing consideration, abstention is appropriate because authoritative resolution of the ambiguities in the state courts is sufficiently likely to avoid or modify the federal constitutional questions. Lake Carriers' Assn. v. MacMullan, p. 498.

2. *Application for conscientious objector discharge—California domicile—Indiana nominal command.*—District Court has jurisdiction under 28 U. S. C. § 2241 (c) (1) to hear and determine habeas corpus application of officer on unattached, inactive Army reserve duty while domiciled in California, where military authorities processed his application for conscientious objector discharge, although he was under the nominal command of commanding officer of the Reserve Officer Components Personnel Center in Indiana. Strait v. Laird, p. 341.

3. *Due process—Commitment because of lack of capacity to stand trial.*—State's indefinite commitment of criminal defendant solely on account of his lack of capacity to stand trial violates due process; such a defendant cannot be held more than the reasonable period necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future and, if there is no such probability, the State must institute civil proceedings applicable to indefinite commitment of those not charged with crime, or release the defendant. Jackson v. Indiana, p. 715.

4. *Injunction—Appeal.*—District Court's injunction respecting number of legislative districts and of senators and representatives is sufficient to justify direct appeal under 28 U. S. C. § 1253. Sixty-seventh Minnesota State Senate v. Beens, p. 187.

5. *Pauper's appeal—Nonfrivolous appeal—Supervening statute.*—Cause remanded for state court's reconsideration in light of supervening statute. Huffman v. Boersen, p. 337.

6. *Revision of election code—Issues, except one, mooted—No allegation of injury.*—The record and pleadings on the one issue not mooted by supervening legislation are inadequate for resolution of the constitutional questions presented; in view of the abstract and speculative posture of the case the appeal is dismissed. Socialist Labor Party v. Gilligan, p. 583.

PROCEDURE—Continued.

7. *State senate—Intervention.*—State senate, here directly affected by District Court's orders, is an appropriate legal entity for purposes of intervention. Sixty-seventh Minnesota State Senate v. Beens, p. 187.

PROOF. See **Constitutional Law**, I, 2–3; **Criminal Law**, 2–3; **Juries**, 1–2.

PROSECUTIONS. See **Constitutional Law**, VII, 2.

PROSECUTORS. See **Constitutional Law**, I, 3; **Criminal Law**, 2; **Juries**, 1.

PROTECTION. See **Constitutional Law**, III, 1, 5; **Grand Juries**, 1–2.

PUBLIC ASSISTANCE PROGRAMS. See **Constitutional Law**, II, 1; **Social Security Act**, 2.

PUBLIC INTEREST. See **Federal Communications Commission.**

PUBLIC INVESTORS. See **Bankruptcy Act**; **Standing to Sue.**

PUBLIC SCHOOLS. See **Constitutional Law**, IV; VI.

PUMP-OUT FACILITIES. See **Abstention**; **Declaratory Judgments**; **Procedure**, 1.

RACIAL DISCRIMINATION. See **Constitutional Law**, I, 3; II, 1; **Criminal Law**, 2; **Juries**, 1; **Social Security Act**, 2.

RACKETEERING. See **Constitutional Law**, III, 2–3.

RAILROADS. See **Administrative Procedure Act**; **Admiralty**; **Arbitration**, 2; **Interstate Commerce Commission**; **Railway Labor Act.**

RAILWAY LABOR ACT. See also **Arbitration**, 2.

Discharge—Breach of contract action based on state law—Grievance and arbitration procedures.—Since the source of railroad employee's right not to be discharged and of his employer's obligation to restore him to regular employment following an injury is the collective-bargaining agreement, employee must follow the grievance and arbitration procedures set forth in the Railway Labor Act. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, overruled. Andrews v. Louisville & Nashville R. Co., p. 320.

RATIONAL GROUNDS. See **Constitutional Law**, I, 3; **Criminal Law**, 2; **Juries**, 1.

REAL DANGERS. See **Constitutional Law**, III, 2–3.

REAPPORTIONMENT. See **Constitutional Law**, II, 2; **Elections**; **Procedure**, 4, 7.

REASONABLE DOUBT. See **Constitutional Law**, I, 2–3; **Criminal Law**, 2–3; **Juries**, 1–2.

RECOUPMENT. See **Bankruptcy Act**; **Standing to Sue.**

RECREATIONAL WATERCRAFT. See **Abstention**; **Declaratory Judgments**; **Procedure**, 1.

REFUSAL TO ANSWER QUESTIONS. See **Constitutional Law**, III, 4.

REFUSAL TO BARGAIN. See **Labor**, 2; **National Labor Relations Act**, 1–2.

REGULATIONS. See **Constitutional Law**, V; **Federal Communications Commission**; **Gun Control Act of 1968.**

REGULATORY INSPECTIONS. See **Constitutional Law**, V; **Gun Control Act of 1968.**

REHEARINGS. See **Jurisdiction**, 1; **Procedure**, 2.

RELIEF. See **Arbitration**, 1; **Constitutional Law**, II, 1; VIII; **Jurisdiction**, 2, 7; **Labor**, 1; **Pollution**; **Social Security Act**, 1–2.

RELIGION. See **Constitutional Law**, IV; VI.

REMEDIES. See **Admiralty**; **Arbitration**, 2; **Railway Labor Act.**

REORGANIZATIONS. See **Bankruptcy Act**; **Standing to Sue.**

REPORT OF SPECIAL MASTER. See **Boundaries.**

REPRESENTATION. See **Labor**, 2; **National Labor Relations Act**, 1–2.

REPRESENTATION BY COUNSEL. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

RESALES. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

RESEARCH AND DEVELOPMENT. See **Jurisdiction**, 6.

RESERVE OFFICERS. See **Jurisdiction**, 1; **Procedure**, 2.

RESIDENCES. See **Aliens**; **Jurisdiction**, 1; **Patents**, 1; **Procedure**, 2; **Venue.**

RESPONSIVE ANSWERS. See **Constitutional Law**, III, 2–3.

RESTITUTION. See **Labor**, 2; **National Labor Relations Act**, 1–2.

RESTORATION. See **Arbitration**, 2; **Railway Labor Act.**

RESTRAINT OF TRADE. See **Jurisdiction**, 6.

RETROACTIVITY. See **Mootness.**

REVISED TARIFFS. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

RIFLES. See **Constitutional Law**, V; **Gun Control Act of 1968.**

RIGHT TO COUNSEL. See **Constitutional Law**, VII, 2.

RIGHT TO REMAIN SILENT. See **Constitutional Law**, VII, 1; **Trials.**

RIGHT TO TRIAL. See **Criminal Law**, 1; **Pleas.**

RIPARIAN LANDS. See **Boundaries.**

ROBBERIES. See **Constitutional Law**, I, 2; **Criminal Law**, 3; **Juries**, 2.

RULE-MAKING POWER. See **Administrative Procedure Act**; **Federal Communications Commission**; **Interstate Commerce Commission.**

RULES. See **Administrative Procedure Act**; **Interstate Commerce Commission.**

SALES OF STOCK. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

SALES RHETORIC. See **Patents**, 2.

SANITY. See **Constitutional Law**, I, 1; II, 3; **Procedure**, 3.

SAWED-OFF RIFLES. See **Constitutional Law**, V; **Gun Control Act of 1968.**

SCHOOL ATTENDANCE. See **Constitutional Law**, IV; VI.

SCOPE OF IMMUNITY. See **Constitutional Law**, III, 1–5.

SCOPE OF THE PRIVILEGE. See **Constitutional Law**, III, 1–5.

SEARCH AND SEIZURE. See **Constitutional Law**, V; **Gun Control Act of 1968.**

SECRETARY OF THE INTERIOR. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

SECURITIES AND EXCHANGE COMMISSION. See **Bankruptcy Act**; **Standing to Sue.**

SECURITIES EXCHANGE ACT OF 1934. See also **Indians**; **Jurisdiction**, 3; **Stockholders.**

Damages—Fraudulent conduct.—Correct measure of damages under § 28 of the Act is difference between fair value of what mixed-blood seller received for his stock and what he would have received had there been no fraudulent conduct (except where defendant received more than seller's actual loss, in which case defendant's profit is amount of damages). Affiliated Ute Citizens v. United States, p. 128.

SECURITY. See **Procedure**, 5.

SECURITY SERVICES. See **Labor**, 2; **National Labor Relations Act**, 1–2.

SELF-INCRIMINATION. See **Constitutional Law**, III, 1–5; VII, 1; **Grand Juries**, 1–2; **Trials.**

SENTENCES. See **Criminal Law**, 1; **Pleas.**

SEQUESTRATION OF WITNESSES. See **Constitutional Law**, VII, 1; **Trials.**

SERVICE CONTRACTS. See **Labor**, 2; **National Labor Relations Act**, 1–2.

SERVICEMEN. See **Constitutional Law**, VIII; **Jurisdiction**, 1; **Procedure**, 2; **Social Security Act**, 1.

SERVICE OF PROCESS. See **Aliens**; **Patents**, 1; **Venue.**

SETOFFS. See **International Law.**

SETTLEMENTS. See **Bankruptcy Act**; **Standing to Sue.**

SEWAGE. See **Abstention**; **Declaratory Judgments**; **Procedure**, 1.

SEWERAGE COMMISSIONS. See **Jurisdiction**, 2, 7; **Pollution.**

SHIPPERS. See **Administrative Procedure Act**; **Interstate Commerce Commission.**

SHORTAGES. See **Federal Power Commission**, 1–2; **Jurisdiction**, 4–5.

SHORTAGES OF FREIGHT CARS. See **Administrative Procedure Act**; **Interstate Commerce Commission.**

SHRIMP DEVEINERS. See **Patents**, 2.

SIGNALS. See **Federal Communications Commission.**

SIXTH AMENDMENT. See **Constitutional Law**, I, 2–3; VII, 1–2; **Criminal Law**, 2–3; **Juries**, 1–2; **Trials.**

SOCIALIST LABOR PARTY. See **Procedure**, 6.

SOCIAL SECURITY ACT. See also **Constitutional Law**, II, 1, 4; VIII; **Workmen's Compensation.**

1. *Supremacy Clause—State definition of "continued absence"—Active military service.*—State regulations exclude active military service from the definition of a parent's "continued absence from the home" so as to deny AFDC benefits to the child and wife of serviceman on active duty; the corresponding criterion of the Social Security Act means that the parent may be absent for any reason; that criterion applies to one who is absent on military service, and California's definition is invalid under the Supremacy Clause. Carleson v. Remillard, p. 598.

SOCIAL SECURITY ACT—Continued.

2. *Texas scheme—Computation procedure—Maximized individual eligibility.*—Section 402 (a)(23) of the Social Security Act does not require use of a computation procedure that maximizes individual eligibility for subsidiary benefits. Jefferson v. Hackney, p. 535.

SONIC BOOMS. See **Tort Claims Act.**

SOVEREIGN IMMUNITY. See **International Law.**

SPECIAL MASTER'S REPORT. See **Boundaries.**

SPECULATIVE DANGERS. See **Constitutional Law,** III, 2–3.

SPORTING WEAPONS. See **Constitutional Law,** V; **Gun Control Act of 1968.**

STANDARDS. See **Constitutional Law,** I, 1; II, 3; **Procedure,** 3.

STANDING TO SUE. See also **Bankruptcy Act; Procedure,** 6.

Indenture—Debentures—Annual financial losses—Involuntary reorganization.—Under Chapter X of the Bankruptcy Act, trustee in reorganization does not have standing to assert, on behalf of debenture holders, claims of misconduct by an indenture trustee. Caplin v. Marine Midland Grace Trust Co., p. 416.

STATE BOUNDARIES. See **Boundaries.**

STATE COMMISSION OF INVESTIGATION. See **Constitutional Law,** III, 2–4.

STATE DEPARTMENT. See **International Law.**

STATE LEGISLATURES. See **Constitutional Law,** II, 2; **Elections; Procedure,** 4, 7.

STATE REPRESENTATIVES. See **Constitutional Law,** II, 2; **Elections; Procedure,** 4, 7.

STATES. See **Jurisdiction,** 2, 7; **Pollution.**

STATE SENATORS. See **Constitutional Law,** II, 2; **Elections; Procedure,** 4, 7.

STATUTES. See **Constitutional Law,** II, 2; **Elections; Procedure,** 4, 7.

STATUTORY IMMUNITY. See **Constitutional Law,** III, 2–4.

STATUTORY RIGHTS. See **Constitutional Law,** V; **Gun Control Act of 1968.**

STEAMBOAT INSPECTION ACTS. See **Abstention; Declaratory Judgments; Procedure,** 1.

STOCK CERTIFICATES. See **Indians; Jurisdiction,** 3; **Securities Exchange Act of 1934; Stockholders.**

STOCKHOLDERS. See also **Indians; Jurisdiction,** 3; **Securities Exchange Act of 1934.**

Misstatements of fact—SEC Rule 10b–5—Market price.—Court of Appeals correctly held that bank employees violated Rule 10b–5 by misstatements of material fact concerning market price of shares, but the court erred in holding no violation of the Rule unless record disclosed evidence of reliance on the misrepresentations. All that is needed is that facts withheld be material in sense that reasonable investor might have considered them important in making his decision. Affiliated Ute Citizens v. United States, p. 128.

STOCK VALUATION. See **Indians; Jurisdiction,** 3; **Securities Exchange Act of 1934; Stockholders.**

STORAGE DEVICES. See **Abstention; Declaratory Judgments; Procedure,** 1.

STOREROOMS. See **Constitutional Law,** V; **Gun Control Act of 1968.**

STRICT LIABILITY. See **Tort Claims Act.**

SUBROGATION. See **Bankruptcy Act; Standing to Sue.**

SUBSCRIBERS. See **Federal Communications Commission.**

SUBSIDIARY BENEFITS. See **Constitutional Law,** II, 1; **Social Security Act,** 2.

SUCCESSOR EMPLOYERS. See **Labor,** 2; **National Labor Relations Act,** 1–2.

SUIT AGAINST ALIENS. See **Aliens; Patents,** 1; **Venue.**

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Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the District of Columbia Circuit, p. 951.

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TORT CLAIMS ACT. See also **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

Sonic boom—Damaged property—Military planes on training mission.—Damage from sonic boom caused by military planes, where no negligence was shown either in the planning or operation of the flight, is not actionable under the Federal Tort Claims Act, which does not authorize suit against the Government on claims based on strict or absolute liability for ultrahazardous activity. Laird v. Nelms, p. 797.

TRAINING MISSIONS. See **Tort Claims Act.**

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Accused penalized by remaining silent at close of State's case.— Requirement that a defendant in a criminal proceeding "desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case" violates the defendant's privilege against self-incrimination; defendant may not be penalized for remaining silent at the close of the State's case by being excluded from the stand later in the trial. Brooks v. Tennessee, p. 605.

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UNREASONABLE SEARCHES. See **Constitutional Law**, V; **Gun Control Act of 1968.**

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UNWILLING WITNESSES. See **Constitutional Law**, III, 1–5; **Grand Juries**, 1–2.

USE AND DERIVATIVE USE. See **Constitutional Law**, III, 1–5; **Grand Juries**, 1–2.

UTE DISTRIBUTION CORP. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

UTE PARTITION ACT. See **Indians**; **Jurisdiction**, 3; **Securities Exchange Act of 1934**; **Stockholders.**

VACATING PLEAS. See **Criminal Law**, 1; **Pleas.**

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VENUE. See also **Aliens**; **Patents**, 1.

Alien corporation—Patent infringement—Place of incorporation—Place of doing business.—Title 28 U. S. C. § 1391 (d), providing that "an alien may be sued in any district," embodies the long-established rule that a suit against an alien is wholly outside the operation of all federal venue laws; hence, § 1400 (b) which provides that a patent infringement suit may be brought in the district of the defendant's residence or where he has committed infringement acts and has a regular place of business, is not the exclusive provision governing venue in patent infringement litigation. Brunette Machine Wks. v. Kockum Industries, p. 706.

VERDICTS. See **Constitutional Law**, I, 2–3; **Criminal Law**, 2–3; **Juries**, 1–2.

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WARRANTLESS SEARCHES. See **Constitutional Law**, V; **Gun Control Act of 1968.**

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WORDS.

1. *"Any district."* 28 U. S. C. § 1391 (d). Brunette Machine Wks. v. Kockum Industries, p. 706.

2. *"Continued absence."* 42 U. S. C. § 606 (a). Carleson v. Remillard, p. 598.

3. *"Laws."* 28 U. S. C. § 1331 (a). Illinois v. City of Milwaukee, p. 91.

4. *"Makes."* 35 U. S. C. § 271 (a). Deepsouth Packing Co. v. Laitram Corp., p. 518.

5. *"Negligent or wrongful act or omission of any employee of the Government."* Federal Tort Claims Act. Laird v. Nelms, p. 797.

6. *"States."* 28 U. S. C. § 1251 (a)(1). Illinois v. City of Milwaukee, p. 91.

WORKMEN'S COMPENSATION. See also **Constitutional Law,** II, 4.

Equal protection of the laws—Illegitimate children—Unacknowledged, illegitimate children.—Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimate children violates the Equal Protection Clause, as inferior classification of these dependent children bears no significant relationship to the recognized purposes of recovery that workmen's compensation statutes were destined to serve. Weber v. Aetna Casualty & Surety Co., p. 164.

WRONGFUL DISCHARGES. See **Arbitration,** 2; **Railway Labor Act.**

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